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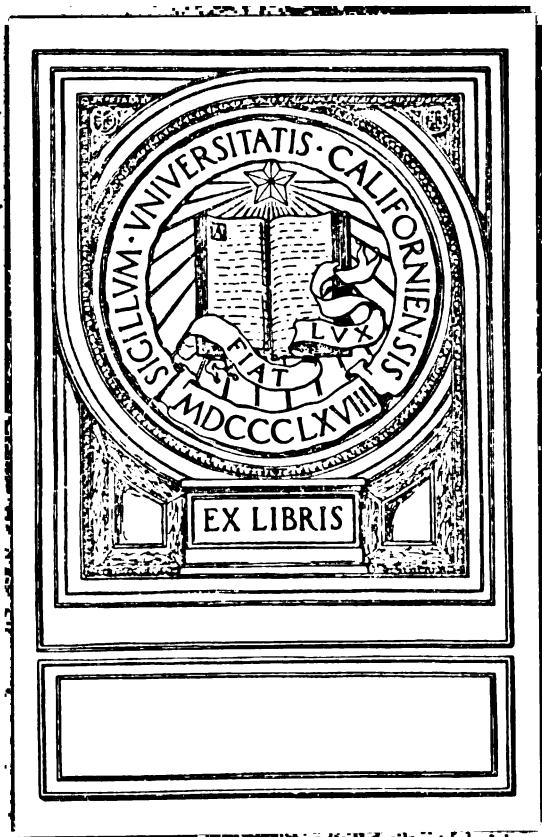
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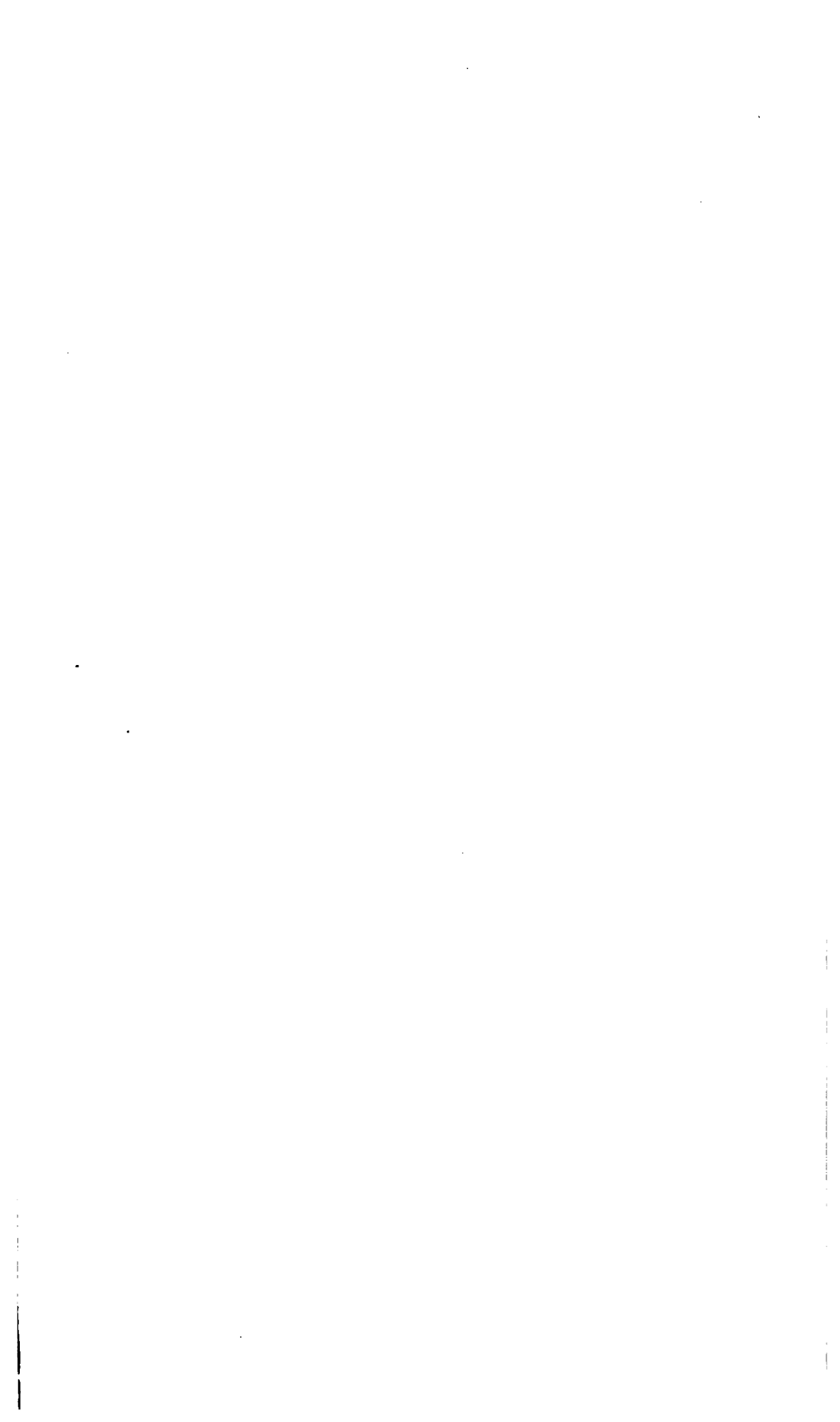














THE

# LEGISLATIVE POWERS

OF

THE COMMONWEALTH AND THE STATES  
OF AUSTRALIA.

WITH PROPOSED AMENDMENTS

BY

THE HONOURABLE SIR JOHN QUICK, K.B., LL.D.,  
BARRISTER-AT-LAW.

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Melbourne, Vic.:

CHARLES F. MAXWELL,  
LAW BOOKSELLER AND PUBLISHER,  
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1919.



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1919.



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## PREFACE.

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THIS work is a natural sequence of the "Annotated Constitution of the Australian Commonwealth," published by Quick and Garran on the eve of the establishment of the Commonwealth on 1st January, 1901. The authors of that work, which was designed to give a forecast of the possible operation of the new instrument of government, were "fully sensible of the difficulty of attempting to expound a Constitution before it had been the subject of practical working or judicial exposition."

No such difficulty has been experienced in the preparation of the present work. After eighteen years of practical legislation and judicial interpretation the Constitution, in all its essential features, is now an open book; its powers and possibilities are revealed to the world as well as to the student, the lawyer, and the legislator.

This book embodies a comprehensive survey of all the statute laws of the Commonwealth, with special reference to such laws as have been judicially interpreted by the High Court of Australia and by the Privy Council. It also reviews State legislation so far as it involves constitutional issues or comes into conflict with Commonwealth laws.

The object is not merely to show the operation of the Federal Constitution and the dual system of Government which it established, but to present the leading features and principles of Commonwealth

legislation passed by a Parliament, which can justly claim to be the most democratic in the world.

Since the beginning of the twentieth century no Parliament in any country has shown such activity and originality in the passing of laws for the peace, order and welfare of the people as the Parliament of United Australia.

In the field of inter-state and external trade and commerce, laws have been passed for the protection of the public against the operations of injurious trusts, combines and monopolies. In connection with inter-state and external navigation, there are laws for the protection of passengers and the shippers of goods against the negligence of shipping companies engaged in the carriage of passengers and goods. Seamen are guaranteed against unfair treatment in their marine employment, and are entitled to compensation in case of accident resulting in personal injuries.

The conservation of the waters of the River Murray for navigation and irrigation purposes has been provided for by the joint co-operation of the Riverine States and the Commonwealth.

The foundation of the Federal Capital has been laid, and a transcontinental railway connecting the eastern States with Western Australia has been built.

In no part of the Commonwealth life and development has the plenitude of legislative powers been brought into such bold relief with such dramatic swiftness and impressiveness as in that of defence.

Several attempts have been made to amend the Constitution, but all proposed alterations have been rejected by the people, who have remained loyal to their original ideals of federation. Upon the return

of the Prime Minister, MR. W. M. HUGHES, to Australia, however, a fresh campaign was initiated to introduce in a modified form constitutional amendments previously rejected. A modified scheme of reform was introduced by him into the House of Representatives on 1st October, 1919 (see *infra*, page 944). The whole of the proposals were carried in both Houses of Parliament, and will be submitted to the people by referendum in December 1919.

The main grounds on which MR. HUGHES justified his proposals in favor of increased Commonwealth powers were the necessity of dealing with "industrial unrest," and the new evil known as "profiteering."

The case for enlarging the industrial power is no stronger now than it was in 1913 and in 1915. Indeed, the futility of further increasing the power of the Commonwealth Conciliation and Arbitration Court was shown by the desperate and prolonged strike of seamen in the middle of 1919, when they refused to submit their grievances to the Arbitration Court, and plumped for direct action.

In no country has the outcry against profiteering been greater than in England. In July 1919 a select committee was appointed to inquire into the causes of high prices, with a view to legislating against the evil. This, however, did not satisfy the suffering people, who demanded immediate action to punish the profiteers, and standardize prices.

The Government afterwards adopted a scheme to establish a net-work of local tribunals throughout the country to deal with charges of profiteering. Each tribunal was empowered to investigate complaints of excessive profits arising in its district, and to impose substantial penalties.

In the English Profiteering Act the principle of local control of prices has been adopted. The British Parliament, with its omnipotent powers, found that the task of dictating uniform selling prices for the whole of England would be almost superhuman, and the British Government decentralized itself by delegating the work to subordinate bodies organized throughout the length and breadth of the country.

On 24th September 1919, a cablegram received in Australia from London, stated that MR. C. A. MAC-CURDY, Parliamentary Secretary to the Ministry of Food, had announced a new food selling order limiting the gross profits of retailers of fish, fruit and vegetables to  $33\frac{1}{3}$  per cent. The Minister stated that it would be impossible to fix uniform prices for the whole country. "Controlled prices," he said, "must be flexible, and rapidly adjustable to meet sudden fluctuations in cost. Therefore the Government was empowering local committees to regulate retail prices in their own districts." The new order commenced to operate in certain Midland areas on 29th September 1919. On 26th September a cablegram received in Australia from London announced that over 1,000 local tribunals or committees had been established under the English Profiteering Act, but that owing to public apathy they had little work to do.

In Australia, the movement to deal with the evils of profiteering has been started on lines quite the opposite of the English legislation. This movement, which synchronized with the return of MR. W. M. HUGHES to Australia, has assumed the form of a demand for increased Federal powers to enable the Commonwealth Parliament and Government to grapple with the whole question. In England the preventive

legislative measures is in the direction of decentralization, whilst in Australia it appears that there is no hope to grapple with the mischief except in the direction of Commonwealth centralization and Commonwealth bureaucracy.

Several of the Australian States, viz., Victoria, South Australia and Tasmania, had already taken steps to regulate prices, or to penalize high profits on the sale of goods. They were, however, moving slowly, not being convinced that the anomalies were so great in Australia as elsewhere.

MR. HUGHES has stepped in with the demand for increased Federal powers to enable the Commonwealth Parliament to do what the States could not, or would not, do.

Under the Constitution as it stands at present, the Commonwealth Parliament has power to legislate with respect to trade and commerce "with other countries and among the States." Briefly expressed, this means that continental and external commerce is federalized, whilst intra-state commerce—that is, buying and selling transactions which begin and end in a State—are subject exclusively to State laws. In other words, the paramount authority of the Commonwealth is applied only to matters of general Australian concern, in which the people of Australia have a community of interest; matters susceptible of treatment on a uniform plan and subject to a uniform regulation.

The standardization of power is the basic principle on which the legislative powers of the Commonwealth have been distributed in the Federal Constitution.

Hence external and inter-state commerce powers may be regarded as examples of standardized powers defining and limiting the Federal authority in trade and commerce to matters of national interest, reserving to the States local trade, commerce and transport.

In this distribution of power there are in relation to trade and commerce two distinct and separate sovereignties within the same territorial area, each of them restricted in its powers, and each within its sphere of action as prescribed by the Constitution being independent of the other. "In matters of foreign and inter-state commerce there are no States." But if the proposed amendment of the Constitution be carried, omitting the words "with other countries and among the States," the power with respect to trade and commerce confined to a State would be concurrently vested in the State and in the Commonwealth, so that an enactment of a State Parliament might be superseded by Commonwealth legislation.

Under existing Commonwealth powers the evils of profiteering could be combated by the following alternative methods :—

1. Taxation.
2. Fixation.
3. Acquisition.

The taxing power of the Commonwealth would probably be the most effective and destructive instrument with which to combat profiteering. By taxation, the Commonwealth Parliament could make it unprofitable on the part of traders to exact excessive profits on the sale of goods. Such profits could be promptly wrested from the offenders by taxation, and thus confiscated and applied to the public revenue. We

have already had experience of similar legislation in the War Time Profits Act, under which profits made during the war in excess of a pre-war standard have been taxed to the extent of 50 per cent. and even up to 75 per cent. of the whole of such profits. That Act, remodelled and improved, might be applied for the purpose of suppressing the exaction of excessive prices in times of peace.

Importers of goods from overseas countries, manufacturers of goods made in Australia, middlemen handling, and retailers finally selling such goods, could be taxed on the profits made by them in excess of a certain amount in every deal and in every remove or change of ownership up to the consumer and user.

The tendency of constitutional decisions in the United States is to hold that the inter-state and external commerce power includes the power of Congress to regulate freights for the carriage of goods, and that commerce includes sale and sale necessarily includes prices and profits (*infra*, page 312). It has been even held that the commerce power covers employers' liability legislation (*infra*, page 287). Most of these decisions have been recognized by the High Court of Australia.

It is an incontestible proposition of Federal law that inter-state and external commerce embraces all matters, the effect of which upon trade and commerce is "direct, substantial and proximate" (page 297). It is wide and strong enough to prohibit unreasonable terms and conditions, which exercise a restraint upon or operate as an obstruction to trade and commerce. Excessive and unreasonable prices would, it is submitted, come within such restraints and obstructions.



Indeed, an existing law of the Commonwealth (*infra* page 273) prohibits unreasonable restraints of trade to the detriment of the public.

It is an axiom of constitutional law that within the sphere of inter-state and external trade there are no States, and therefore it may be assumed that authority to determine what are fair and reasonable prices on the sale of goods within that exclusive Federal sphere is within the competency of the Parliament of the Commonwealth. That power being established, incidental and implied power of the Constitution (section 51 (xxxix.)) comes to the assistance of the direct power and enables the Parliament to pass penal laws for the enforcement of any commerce law: *Stemp v. Australian Glass Manufacturing Co. Ltd.*, (1917) 23 C.L.R., 266; *Waterside Workers' Federation v. J. W. Alexander & Co. Ltd.*, (1918) 25 C.L.R., 434.

With reference to goods made or produced in Australia such as bread, butter, meat, coal, sugar, soap, boots and shoes, the Commonwealth, it is submitted, could by proper price-controllers, fix standard selling prices of any such goods, based on their cost of production, with a fair percentage of turnover profit added, and it could, if deemed necessary, provide that if such goods were afterwards sold for inter-state trade at prices in excess of such standard prices so fixed, they should be followed, and the vendors rendered liable to a penalty equivalent to the excess profit, thus forfeiting the excess profit to the Commonwealth Treasury.

As regards goods imported into the Commonwealth from other countries, if deemed necessary, the Commonwealth, it is submitted, could through proper price-controllers, fix the standard selling prices of such goods

based on their values landed in Australia with a fair percentage of profit added and if such goods were afterwards sold at prices in excess of such standard selling prices they could be followed and the vendors rendered liable to a penalty equivalent to such excess, thus forfeiting such excess profits to the Commonwealth Treasury.

The difficulties of standardization and variation would be very great, but such difficulties would be encountered in any scheme, Commonwealth or State, for the fixation of prices, as the price-fixers under the War Precautions Act can vividly testify. The price of the same article, say a loaf of bread, might vary in different localities owing to differences in the wages of bakers and carters; in the areas and cost of distribution; in the rent of premises; in the costs of living; and the hours of labor.

A prolific cause of the inflation of prices, wholesale and retail, in Australia, is the extraordinary amount of speculation that takes place in the sale and re-sale of goods whilst they are *in transitu* on the high seas after leaving the exporting country. It is a notorious fact that large consignments of goods are frequently sold whilst they are on the high seas at prices amounting to 15 and 20 per cent. in advance of the "free on board" or invoice values. Such goods, when they arrive in Australia, have thus acquired an artificial value far in excess of the real value on which import duty is required to be paid. In order to discourage this gambling and consequent inflation of prices, the customs department ought to ascertain whether there has been any change in the ownership of goods between the country of origin and their arrival in Australia and where advisable the Collector should exercise

his power of seizure, acquisition and sale under the Customs Act, section 161.

The Commonwealth could, by appropriate legislation, also assert its right, in special cases where false invoices or false declarations of value or violation of law are suspected, to acquire the property in goods, the subject of external or inter-state trade, on just terms to be decided by a court of competent jurisdiction. The Government could afterwards re-sell such goods to the public at prices sufficient to cover the cost of acquisition and the expenses of distribution. A precedent for this drastic remedy is to be found in the Commonwealth Land Tax Assessment Act, section 48; Constitution, sec. 51 (I.) "Commerce"; 51 (II.) "Taxation"; 51 (XXXI.) "Acquisition of Property."

The selling prices of goods made, produced and consumed within a State (trade beginning and ending in a State) might well be left to the State Parliaments to deal with in the exercise of their reserved powers. If the States refuse to exercise such powers, when required, they will admit their own inefficiency; they will stand self condemned in the forum of public opinion, and their autonomous existence will be endangered.

Such are some of the latent powers of the Commonwealth which might well be resorted to in order to rectify the grievances complained of before proceeding to amend, and possibly to mutilate the Federal Constitution under which we live. Yet it is considered that these powers, as yet unused and untested, are not wide enough. Nothing will satisfy the Federal authorities, as at present constituted, less than the complete federalization of the trade and commerce power.

The Profiteering Act in England has resulted in the decentralization of authority, and in the differentiation of selling rates rather than the centralization of authority and the uniformity of selling rates.

The 1,000 local committees called into existence in England might well be represented in Australia by the State Governments and the municipalities, which would be able to undertake the price-fixing business in different localities and the prosecution of profiteers more effectually than any Commonwealth Commission could do.

The utilization of existing machinery and agencies of government in the shape of the States and the municipalities does not present such an attractive programme as a scheme to "dish the Whigs" and amend the instrument of government.

With the return of normal competition, and the free play of the forces of supply and demand, the profiteering sensation will pass away, but if the Constitution be amended in the direction sought, it may remain on the Statute book to be used hereafter by other political parties when they come into power, and it may be used for some unexpected purpose.

It is probable that in the years to come, trade and commerce may receive a wider interpretation than "the buying, selling and transportation of goods." There is a tendency in the United States to hold that commerce includes manufacture and production for the purpose of trade, such as agriculture, stock raising, and mining, etc., so that a contract directly affecting manufacture and production for the purposes exclusively of inter-state or external commerce might fall within a Federal law regulating selling prices. This possible result has been foreseen and forecasted in a

judgment of the Supreme Court in one of the sugar trust cases cited by MR. P. M. GLYNN, K.C., M.P., in his informative pamphlet on "The Federal Constitution": *In re Green and United States v. Knight & Co., Federal Anti-Trust Decisions*, Vol. I., pp. 55, 379 and 391.

### ACKNOWLEDGMENTS.

"THE Legislative Powers of the Commonwealth and the States," as now published, is but a modified plan of a larger work, the second edition of the "Annotated Constitution," which my friend and former literary collaborator, Sir Robert R. Garran, and I at one time designed to jointly publish. Unfortunately, the outbreak of the War and the rush of Commonwealth work consequent thereon, prevented Sir Robert from continuing his association with me in that scheme, and I had to prosecute my literary enterprise on a reduced and less ambitious scale. In this I have felt the loss of his co-operation which I enjoyed in previous undertakings. At the same time I have been able, by his kind permission, to use a number of valuable and interesting notes written by him for the larger work, which are to be found in several places within these pages, and are duly associated with his name.

I have to tender my acknowledgments and thanks for assistance in the collection of official information and the revision of proofs to the following gentlemen:—

Mr. Charles Gavan Duffy, C.M.G., Clerk of the Parliament.

Sir Robert R. Garran, C.M.G., M.A., Solicitor-General of the Commonwealth.

Mr. George S. Knowles, M.A., LL.M., Acting Solicitor-General of the Commonwealth Law Depart-

ment during the absence of Sir Robert R. Garran, attending the Prime Minister at the Peace Conference.

Mr. J. R. Collins, A.I.A.V., Secretary of the Commonwealth Treasury.

Mr. Atlee A. Hunt, C.M.G., Secretary for the Department of Home and Territories.

Mr. T. Trumble, C.B.E., Secretary for the Defence Department.

Mr. Geo. L. Macandie, Secretary for the Royal Australian Navy.

Mr. W. B. Edwards Acting Public Service Commissioner.

Mr. G. H. Knibbs, C.M.G., Commonwealth Statistician.

Mr. A. B. Piddington, K.C., Chairman of the Inter-State Commission.

Mr. R. Ewing, Commissioner of Taxation.

Mr. A. M. Stewart, Registrar of Commonwealth Court of Conciliation and Arbitration.

Mr. R. C. Oldham, Chief Electoral Officer.

Mr. John Schutt, late Librarian of the Supreme Court of Victoria.

Mr. Arthur Wadsworth, Librarian of the Commonwealth Parliament.

Mr. B. Harry Friend, Principal Parliamentary Reporter.

For the up-to-date tabulated lists of Governors-General, Parliaments and Ministers of State, I am indebted to Mr. G. H. Knibbs, Commonwealth Statistician.

I desire to pay a tribute of thanks to the proprietors and reporters of the Commonwealth Law

Reports, of which 25 magnificent volumes have been published, containing the judgments of the High Court of Australia in all the great cases which have come before that tribunal since its establishment. These reports in themselves constitute a veritable library as well as a treasury of legal knowledge and information, without access to which these commentaries could not have been written.

The useful index attached to the official print of the Constitution has been used as the framework and model of the exhaustive index to be found at the end of this volume, covering, it is believed, all the subjects and matters herein dealt with.

JOHN QUICK.

BENDIGO,  
10th October, 1919.

# THE COMMONWEALTH OF AUSTRALIA.

ESTABLISHED 1ST JANUARY 1901.

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## SOVEREIGNS.

HER MAJESTY QUEEN VICTORIA.

Died 22nd January, 1901.

HIS MAJESTY KING EDWARD VII.

Died 6th May, 1910.

HIS MAJESTY KING GEORGE V.

Proclaimed 9th May, 1910.



## GOVERNORS-GENERAL.

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- RT. HON. EARL OF HOPETOUN (afterwards MARQUIS OF LINLITHGOW), P.C., K.T., G.C.M.G., G.C.V.O. Sworn 1st January, 1901 ; recalled 9th May, 1902 ; left Melbourne 2nd July, 1902.
- RT. HON. HALLAM BARON TENNYSON, G.C.M.G. (Acting Governor-General). Sworn 17th July, 1902.
- RT. HON. HALLAM BARON TENNYSON, G.C.M.G. (Governor-General). Sworn 9th January, 1903 ; recalled 21st January, 1904.
- RT. HON. HENRY STAFFORD BARON NORTHCOTE, P.C., G.C.M.G., G.C.I.E., C.B. Sworn 21st January, 1904 ; recalled 8th September, 1908.
- RT. HON. WILLIAM HUMBLE EARL OF DUDLEY, P.C., G.C.M.G., G.C.V.O., Etc. Sworn 9th September, 1908 ; recalled 31st July, 1911.
- RT. HON. THOMAS BARON DENMAN, P.C., G.C.M.G., K.C.V.O. Sworn 31st July, 1911.
- RT. HON. SIR RONALD CRAUFURD MUNRO-FERGUSON, P.C., G.C.M.G. Sworn 18th May, 1914.

## COMMONWEALTH PARLIAMENTS.

1901 TO 1919.

	Date of Opening.	Date of Dissolution.
<b>First Parliament ..</b>	<b>29th April, 1901 ..</b>	<b>23rd November, 1903</b>
<b>Second Parliament</b>	<b>2nd March, 1904</b>	<b>12th October, 1906</b>
<b>Third Parliament ..</b>	<b>20th February, 1907</b>	<b>19th February, 1910</b>
<b>Fourth Parliament</b>	<b>1st July, 1910 ..</b>	<b>23rd April, 1913</b>
<b>Fifth Parliament ..</b>	<b>9th July, 1913 ..</b>	<b>*27th June, 1914</b>
<b>Sixth Parliament ..</b>	<b>8th October, 1914</b>	<b>26th March, 1917</b>
<b>Seventh Parliament</b>	<b>14th June, 1917 ..</b>	—

\* On this occasion, the Governor-General (Sir R. Munro-Ferguson), acting on the advice of the Ministry, under section 57 of the Constitution, granted a dissolution of both the Senate and the House of Representatives, this being the first simultaneous dissolution of both Houses.

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**RESPONSIBLE GOVERNMENTS.**

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**BARTON ADMINISTRATION**, 1st January, 1901, to 23rd September, 1903.

**FIRST DEAKIN ADMINISTRATION**, 23rd September, 1903, to 26th April, 1904.

**WATSON ADMINISTRATION**, 26th April to 17th August, 1904.

**REID-McLEAN ADMINISTRATION**, 17th August, 1904, to 4th July, 1905.

**SECOND DEAKIN ADMINISTRATION**, 4th July, 1905, to 12th November, 1908.

**FIRST FISHER ADMINISTRATION**, 12th November, 1908, to 2nd June, 1909.

**THIRD DEAKIN ADMINISTRATION**, 2nd June, 1909, to 29th April, 1910.

**SECOND FISHER ADMINISTRATION**, 29th April, 1910, to 20th June, 1913.

**COOK ADMINISTRATION**, 20th June, 1913, to 17th September, 1914.

**THIRD FISHER ADMINISTRATION**, 17th September, 1914, to 27th October, 1915.

**FIRST HUGHES ADMINISTRATION**, from 27th October, 1915, to 14th November, 1916.

**SECOND HUGHES ADMINISTRATION**, from 14th November, 1916, to 17th February, 1917.

**AUSTRALIAN NATIONAL WAR (HUGHES) GOVERNMENT**, from 17th February, 1917.

## MINISTERS OF STATE.

FROM 1ST JANUARY, 1901, TO OCTOBER, 1919.

## HOME AND TERRITORIES.

(Previous to 14/11/16 known as External Affairs.)

Name.	From	To
§Rt. Hon. E. BARTON, P.C., K.C.* ..	1/1/01	23/9/03
Hon. A. DEAKIN* ..	23/9/03	26/4/04
Hon. W. M. HUGHES ¶¶ ..	26/4/04	17/8/04
Rt. Hon. G. H. REID, P.C., K.C.** ..	17/8/04	4/7/05
Hon. A. DEAKIN* ..	4/7/05	12/11/08
Hon. E. L. BATCHELOR ..	12/11/08	2/6/09
Hon. L. E. GROOM ..	2/6/09	29/4/10
Hon. E. L. BATCHELOR ..	29/4/10	¶8/10/11
Hon. J. THOMAS ..	14/10/11	20/5/13
Hon. P. McM. GLYNN, K.C. ..	20/5/13	17/9/14
Hon. J. A. ARTHUR ..	17/9/14	¶9/12/14
Hon. HUGH MAHON ..	14/12/14	14/11/16
Hon. F. W. BAMFORD ..	14/11/16	17/2/17
Hon. P. McM. GLYNN, K.C. ..	17/2/17	

## ATTORNEY-GENERAL.

Name.	From	To
Hon. A. DEAKIN ..	1/1/01	23/9/03
Hon. J. G. DRAKE ..	23/9/03	26/4/04
Hon. H. B. HIGGINS, K.C. ..	26/4/04	17/8/04
Hon. Sir J. H. SYMON, K.C.M.G., K.C. ..	17/8/04	4/7/05
Hon. I. A. ISAACS ..	4/7/05	11/10/06
Hon. L. E. GROOM ..	11/10/06	12/11/08
Hon. W. M. HUGHES ¶¶ ..	12/11/08	2/6/09
Hon. P. McM. GLYNN ..	2/6/09	29/4/10
Hon. W. M. HUGHES ¶¶ ..	29/4/10	20/5/13
Hon. W. H. IRVINE, K.C.    ..	20/5/13	17/9/14
Hon. W. M. HUGHES* ¶¶ ..	17/9/14	

\* Prime Minister. § Afterwards the Rt. Hon. Sir E. Barton, P.C., G.C.M.G., etc. ¶¶ Afterwards the Rt. Hon. W. M. Hughes, P.C. \*\* Prime Minister, afterwards the Rt. Hon. Sir G. H. Reid, P.C., K.C.M.G. G.C.M.G. ¶ Died while holding office. || Still in office. ||| Afterwards the Hon. Sir W. H. Irvine, K.C.M.G., K.C.

MINISTERS OF STATE—*continued*.

## WORKS AND RAILWAYS.

(Previous to 14/11/16 known as Home Affairs.)

Name.	From	To
Hon. Sir W. J. LYNE, K.C.M.G. ..	1/1/01	7/8/03
Rt. Hon. Sir J. FORREST, P.C., G.C.M.G.*** .. ..	7/8/03	26/4/04
Hon. E. L. BATCHELOR .. ..	26/4/04	17/8/04
Hon. D. THOMPSON .. ..	17/8/04	4/7/05
Hon. L. E. GROOM .. ..	4/7/05	11/10/06
†Hon. T. T. EWING .. ..	11/10/06	23/1/07
Hon. J. H. KEATING .. ..	23/1/07	12/11/08
Hon. H. MAHON .. ..	12/11/08	2/6/09
Hon. G. W. FULLER .. ..	2/6/09	29/4/10
Hon. K. O'MALLEY .. ..	29/4/10	20/5/13
Hon. JOSEPH COOK* §§ .. ..	20/5/13	17/9/14
Hon. W. O. ARCHIBALD .. ..	17/9/14	27/10/15
Hon. K. O'MALLEY .. ..	27/10/15	14/11/16
Hon. P. J. LYNCH .. ..	14/11/16	17/2/17
Hon. W. A. WATT .. ..	17/2/17	27/3/18
Hon. L. E. GROOM .. ..	27/3/18	

## POSTMASTER-GENERAL.

Name.	From	To
Rt. Hon. Sir JOHN FORREST, P.C. G.C.M.G.*** .. ..	1/1/01	17/1/01
Hon. J. G. DRAKE .. ..	5/2/01	7/8/03
Hon. Sir P. O. FYSH, K.C.M.G. ..	7/8/03	26/4/04
Hon. H. MAHON .. ..	26/4/04	17/8/04
Hon. S. SMITH .. ..	17/8/04	4/7/05
Hon. A. CHAPMAN .. ..	4/7/05	29/7/07
Hon. S. MAUGER .. ..	29/7/07	12/11/08
Hon. J. THOMAS .. ..	12/11/08	2/6/09
Hon. Sir JOHN QUICK, K.B., LL.D. ..	2/6/09	29/4/10
Hon. J. THOMAS .. ..	29/4/10	14/10/11
Hon. C. E. FRAZER .. ..	14/10/11	20/5/13
Hon. AGAR WYNNE .. ..	20/5/13	17/9/14
Hon. W. G. SPENCE .. ..	17/9/14	27/10/15
Hon. W. WEBSTER .. ..	27/10/15	

\*\*\* Afterwards Lord Forrest of Bunbury. \* Prime Minister. §§ Afterwards the Rt. Hon. Sir J. Cook, P.C., G.C.M.G. † Afterwards the Hon. Sir T. T. Ewing, K.C.M.G. || Still in office.

MINISTERS OF STATE—*continued*.

## TRADE AND CUSTOMS.

Name.	From	To
Rt. Hon. C. C. KINGSTON, P.C., K.C. ..	1/1/01	24/7/03
Hon. Sir W. J. LYNE, K.C.M.G. ..	7/8/03	26/4/04
Hon. A. FISHER †† .. ..	26/4/04	17/8/04
Hon. A. McLEAN .. ..	17/8/04	4/7/05
Hon. Sir W. J. LYNE, K.C.M.G. ..	4/7/05	29/7/07
Hon. A. CHAPMAN .. ..	29/7/07	12/11/08
Hon. F. G. TUDOR .. ..	12/11/08	2/6/09
Hon. Sir R. W. BEST, K.C.M.G. ..	2/6/09	29/4/10
Hon. F. G. TUDOR .. ..	29/4/10	20/5/13
Hon. L. E. GROOM .. ..	20/5/13	17/9/14
Hon. F. G. TUDOR .. ..	17/9/14	14/9/16
Rt. Hon. Wm. HUGHES, P.C. ..	29/9/16	14/11/16
Hon. W. O. ARCHIBALD .. ..	14/11/16	17/2/17
Hon. J. A. JENSEN .. ..	17/2/17	13/12/18
Hon. W. M. GREENE .. ..	3/1/19	

## TREASURER.

Name.	From	To
Rt. Hon. Sir G. TURNER, P.C., K.C.M.G. ..	1/1/01	26/4/04
Hon. J. C. WATSON* .. ..	26/4/04	17/8/04
Rt. Hon. Sir G. TURNER, P.C., K.C.M.G. ..	17/8/04	4/7/05
Rt. Hon. Sir J. Forrest, P.C., G.C.M.G.***	4/7/05	29/7/07
Hon. Sir W. J. LYNE, K.C.M.G. ..	29/7/07	12/11/08
Hon. A. FISHER* †† .. ..	12/11/08	2/6/09
Rt. Hon. Sir J. FORREST, P.C., G.C.M.G.*** .. ..	2/6/09	29/4/10
Rt. Hon. A. FISHER, P.C.* .. ..	29/4/10	20/5/13
Rt. Hon. Sir J. FORREST, P.C., G.C.M.G.*** .. ..	20/5/13	17/9/14
Rt. Hon. A. FISHER, P.C.* .. ..	17/9/14	27/10/15
Hon. W. G. HIGGS .. ..	27/10/15	27/10/16
Hon. A. POYNTON .. ..	24/11/16	17/2/17
Rt. Hon. Sir J. FORREST, P.C., G.C.M.G.*** .. ..	17/2/17	27/3/18
Hon. W. A. WATT .. ..	27/3/18	

†† Afterwards the Rt. Hon. A. Fisher, P.C. \* Prime Minister. \*\*\* Afterwards Lord Forrest of Bunbury. || Still in office.

MINISTERS OF STATE—*continued.*

## DEFENCE.

Name.	From	To
Hon. Sir J. R. DICKSON, K.C.M.G. ..	1/1/01	¶10/1/01
Rt. Hon. Sir J. FORREST, P.C., G.C.M.G.*** .. ..	17/1/01	7/8/03
Hon. J. G. DRAKE .. ..	7/8/03	23/9/03
Hon. A. CHAPMAN .. ..	23/9/03	26/4/04
Hon. A. DAWSON .. ..	26/4/04	17/8/04
Hon. J. W. McCAY ††† .. ..	17/8/04	4/7/05
Hon. T. PLAYFORD .. ..	4/7/05	23/1/07
Hon. Sir T. T. EWING, K.C.M.G. ..	23/1/07	12/11/08
Hon. G. F. PEARCE .. ..	12/11/08	2/6/09
Hon. J. COOK §§ .. ..	2/6/09	29/4/10
Hon. G. F. PEARCE .. ..	29/4/10	20/5/13
Hon. E. D. MILLEN .. ..	20/5/13	17/9/14
Hon. G. F. PEARCE .. ..	17/9/14	

## VICE-PRESIDENT OF THE EXECUTIVE COUNCIL.

Name.	From	To
Hon. R. E. O'CONNOR, K.C. ..	1/1/01	23/9/03
Hon. T. PLAYFORD .. ..	23/9/03	26/4/04
Hon. G. MCGREGOR .. ..	26/4/04	17/8/04
Hon. J. G. DRAKE .. ..	17/8/04	4/7/05
Hon. T. T. EWING † .. ..	4/7/05	11/10/06
Hon. J. H. KEATING .. ..	11/10/06	19/2/07
Hon. Sir R. W. BEST, K.C.M.G. ..	19/2/07	12/11/08
Hon. G. MCGREGOR .. ..	12/11/08	2/6/09
Hon. E. D. MILLEN .. ..	2/6/09	29/4/10
Hon. G. MCGREGOR .. ..	29/4/10	20/5/13
Hon. J. H. MCCOLL .. ..	20/5/13	17/9/14
Hon. A. GARDINER .. ..	17/9/14	27/11/16
Hon. W. G. SPENCE .. ..	27/11/16	17/2/17
Hon. E. D. MILLEN .. ..	17/2/17	16/11/17
Hon. L. E. GROOM .. ..	16/11/17	27/3/18
Hon. E. J. RUSSELL .. ..	27/3/18	

\*\*\* Afterwards Lord Forrest of Bunbury. ††† Afterwards the Hon. Sir J. W. McCay, K.C.M.G. §§ Afterwards the Rt. Hon. Sir J. Cook, P.C., G.C.M.G. † Afterwards the Hon. Sir T. T. Ewing, K.C.M.G. ¶ Died while holding office. || Still in office.

## COMMONWEALTH MINISTERS.

xxv.

## MINISTERS OF STATE—continued.

## WITHOUT PORTFOLIO.

Name.	From	To
Hon. N. E. LEWIS † .. ..	1/1/01	23/4/01
Hon. Sir P. O. FYSH, K.C.M.G. .. ..	23/4/01	7/8/03
Hon. J. H. KEATING .. ..	5/7/05	11/10/06
Hon. S. MAUGER .. ..	11/10/06	29/7/07
Hon. J. H. COOK .. ..	28/1/08	12/11/08
Hon. J. HUTCHISON .. ..	12/11/08	2/6/09
Hon. A. DEAKIN* .. ..	2/6/09	29/4/10
Col. Hon. J. F. G. FOXTON, C.M.G. .. ..	2/6/09	29/4/10
Hon. E. FINDLEY .. ..	29/4/10	20/5/13
Hon. C. E. FRAZER .. ..	29/4/10	14/10/11
Hon. E. A. ROBERTS .. ..	23/10/11	20/5/13
Hon. J. S. CLEMONS .. ..	20/5/13	17/9/14
Hon. W. H. KELLY .. ..	20/5/13	17/9/14
Hon. H. MAHON .. ..	17/9/14	14/12/14
Hon. J. A. JENSEN .. ..	17/9/14	12/7/15
Hon. E. J. RUSSELL .. ..	17/9/14	27/3/18
Hon. W. H. LAIRD SMITH .. ..	14/11/16	17/2/17
Hon. L. E. GROOM .. ..	17/2/17	16/11/17
Hon. A. POYNTON .. ..	26/3/18	
Hon. G. H. WISE .. ..	26/3/18	
Hon. W. M. GREENE .. ..	26/3/18	
Hon. R. B. ORCHARD .. ..	26/3/18	

## THE NAVY.

Name.	From	To
Hon. J. A. JENSEN .. ..	12/7/15	17/2/17
Right Hon. J. COOK, P.C. §§ .. ..	17/2/17	

## REPATRIATION.

Name.	From	To
Hon. E. D. MILLEN .. ..	28/9/17	

† Afterwards the Hon. Sir N. E. Lewis, K.C.M.G. \* Prime Minister.

§§ Afterwards the Rt. Hon. Sir J. Cook, P.C., G.C.M.G. || Still in office.



# THE HIGH COURT OF AUSTRALIA.

---

## CONSTITUTION.

THE RIGHT HONOURABLE SIR SAMUEL WALKER  
GRIFFITH, P.C., G.C.M.G., CHIEF JUSTICE.

Commissioned 5th October 1903.

Retired 17th October, 1919.

THE HONOURABLE ADRIAN KNOX, C.M.G., K.C., CHIEF  
JUSTICE.

Commissioned 18th October, 1919.

THE RIGHT HONOURABLE SIR EDMUND BARTON,  
P.C., G.C.M.G.

Commissioned 5th October 1903.

THE HONOURABLE RICHARD EDWARD O'CONNOR.

Commissioned 5th October 1903.

Died 18th November, 1912.-

THE HONOURABLE ISAAC ALFRED ISAACS.

Commissioned 12th October 1906.

THE HONOURABLE HENRY BOURNES HIGGINS.

Commissioned 13th October 1906.

THE HONOURABLE FRANK GAVAN DUFFY.

Commissioned 11th February 1912.

THE HONOURABLE CHARLES POWERS.

Commissioned 5th March 1913.

THE HONOURABLE GEORGE EDWARD RICH.

Commissioned 5th April 1913.

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# LEGISLATIVE POWERS OF THE COMMONWEALTH AND THE STATES OF AUSTRALIA.

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## CHAPTER I.

### HISTORICAL SURVEY.

#### EIGHTEEN YEARS OF COMMONWEALTH PROGRESS AND DEVELOPMENT.

##### **Inauguration.**

To those who were privileged to witness the consummation of the grand ideal of Australian patriotism, Federal Union, it is a source of satisfaction to be spared to look back and engage in a retrospect extending over eighteen years of memorable and progressive Commonwealth history. Amid Te Deums and anthems of church services the booming of guns, awakening the echo of the midnight air the flash of light and fireworks scintillating o'er land and sea, the joyous shouts and cheers of multitudes assembled in all parts of the continent, in eager expectancy, awaiting and watching the passing of the old and the advent of the new century, the Commonwealth came into existence and started upon its glorious career. The old order passed and the new order appeared.

Never was a century ushered in under auspices more promising of "Peace on Earth and Good-will towards Men" than the 20th of the Christian era whose dawn was coincident with the inauguration of the Australian Commonwealth. And yet at that very moment the enemy of mankind, in the shape of the German nation, hushed in grim and stealthy repose, awaited his prey, being almost then ready to make his spring in a tragic war which has since convulsed Europe with ruin and bloodshed and has threatened the very



existence of modern civilization. All unconscious of this coming tragedy were the joyous celebrants of the new-born Commonwealth. It was indeed well for the Empire and for Australia itself, that the Federal Union of the Australian Colonies was not longer delayed ; that the Commonwealth was established just in time to put its house in order and prepare for the great war. The first fourteen years of Federal history in Australia as if with inspired prescience were well spent in organization and preparation for the inevitable decrees of fate. When the time came it found Australia no longer divided into six separate Colonies, as in the first hundred years of its history, but welded together in one indestructible union under the Crown and ready to respond to the call of Empire and its duty to the world.

The striking feature of the Federal change was that it was brought about not as the result of a revolutionary disturbance, but in a peaceful constitutional manner with the concurrence and goodwill of the Australian people in all the Colonies (now States) with the benediction of Her Most Gracious Majesty, QUEEN VICTORIA and with the hearty co-operation of the British people and the British Parliament.

True, there were a number of persons in Australia who under the varying names of anti-federalists, anti-billities and unificationists, opposed Federation on the terms and conditions settled in the Constitution Act. They indulged in gloomy forebodings and Cassandra-like vaticinations ; some forecasting dangers to civil liberty ; others predicting dangers to State rights ; some prophesying dangers to free-trade ; others dangers to protection, dangers to democracy, dangers to labour, dangers to the small States, dangers to the large States, dangers to New South Wales, dangers to Victoria. With this array and coalition of opposition forces the real wonder is that the Constitution was accepted by the majority of people voting in all the States. The acceptance of the Constitution with all its blemishes, real and imaginary, in spite of and in the teeth of such antagonism, is a lasting testimony of what must have been a deeply rooted instinct in the masses of the people in favour of Federal union and a proof of profound and determined aversion to the continued separation and isolation of the Australian Colonies. They responded to the promptings of national yearnings and the voice of national destiny, in preference to appeals to parochialism, localism, trade jealousy, class prejudice and lawyer-like quibbles.

All these difficulties and objections were swept aside in that Pan-Australian "Amen" with which the Constitution was adopted and became the law of the land. They reasoned well. They realized that in the preparation of any deed of political partnership it would be impossible for human wit and wisdom, however accommodating, to please all at the beginning and that it would be better to federate on the best and most practicable working terms attainable rather than run the risk and dangers of delay which might lead only to greater discordance and greater obstacles to union in the future. They knew also that the Constitution was not a cast iron instrument incapable of improvement but that it contained within itself the germ, the power, and the potency of growth and adjustment sufficient to meet the demands of a progressive Commonwealth consistently with the main outlines of the federal plan.

The Act for the Constitution of the Australian Commonwealth received the Royal Assent on the 9th July, 1900. By Proclamation dated 17th September following, QUEEN VICTORIA appointed the 1st January 1901, as the day for the legal establishment and inauguration of the Commonwealth. By Letter Patents of 29th October, 1900, Her Majesty constituted the office of Governor-General and by Commission of the same date the EARL OF HOPETOUN was appointed to be the first Governor-General of the Commonwealth.

Lord HOPETOUN reached Sydney on the 15th of December 1900, and at once set to work to secure responsible advisers, in order that when the appointed day came the Government of the Commonwealth forthwith organized and brought into action, on the 19th December, he sent for Sir WILLIAM LYNE, who was then Premier of New South Wales, the senior and most populous of the Colonies which were about to become States of the Commonwealth. Five days later, Sir WILLIAM LYNE, finding himself unable to form an acceptable Administration, returned the Commission, and Lord HOPETOUN, in accordance with Sir WILLIAM's advice, sent for Mr. (afterwards Sir) EDMUND BARTON, who had been the leader of the Convention which framed the Constitution, and was the recognized leader of the federal movement. Mr. EDMUND BARTON accepted the task and a few days later he submitted to his Excellency the names of the gentlemen whom he recommended for appointment as members of the Federal Executive Council and Ministers of State. So far, all was merely preliminary ; no portfolios could be assigned

or appointments made until the day fixed for the Proclamation for which everything was now in readiness.

The proceedings at the inauguration of the Commonwealth which took place in the Centennial Park, Sydney, at noon on the 1st of January 1901, were on a dramatic scale and full of thrilling interest. There was assembled a vast multitude numbering not less than 100,000 people including the official representatives of many countries and a brilliant detachment of Imperial troops. The Governor-General standing in a specially prepared pavillion, situated on an eminence in the centre of the Park, and immediately surrounded by the gentlemen chosen to be his political advisers, read the Queen's Proclamation of the Commonwealth. The letters patent and commission appointing him Governor-General were also read. The prescribed oaths of allegiance and of office were then administered to the Earl by Sir FREDERICK M. DARLEY, C.J., the Lieutenant Governor of New South Wales.

#### **First Commonwealth Ministry.**

The oaths of allegiance and of office were then administered to the nine gentlemen who had been chosen to be members of the Executive Council. Their names and the several offices assigned to them, at the first formal meeting of the Executive Council held during the afternoon were as follows :—

Mr. (now Sir) EDMUND BARTON, New South Wales (Leader of the Federal Convention), Prime Minister and Minister of External Affairs : afterwards appointed a Justice of the High Court.

Sir WILLIAM LYNE (a member of the Federal Convention ; retiring Premier of New South Wales), Minister of Home Affairs ; afterwards Minister of Customs and Treasurer in the Deakin Administration.

Sir GEORGE TURNER (a member of the Federal Convention ; retiring Premier of Victoria), Treasurer ; afterwards Treasurer in the Reid-McLean Administration.

Mr. ALFRED DEAKIN (a member of the Federal Convention), Attorney-General ; afterwards Prime Minister in three administrations.

Mr. C. C. KINGSTON (President of the Federal Convention ; retiring Premier of South Australia), Minister of Customs.

Mr. (afterwards Sir) J. R. DICKSON (retiring Home Secretary of Queensland), Minister of Defence.

Sir JOHN FORREST (a Member of the Federal Convention ; retiring Premier of Western Australia), Post Master General ; and shortly afterwards Minister of Defence in succession to Sir J. R. DICKSON ; subsequently Treasurer in three administrations.

Mr. RICHARD E. O'CONNOR, N.S.W. (a Member of the Federal Convention) Minister without portfolio and Vice-President of the Executive Council ; afterwards a Justice of the High Court.

Mr. (now Sir) N. E. LEWIS (Tasmania), Minister without portfolio, subsequently succeeded by Sir PHILLIP FYSH.

On the death of Sir J. R. DICKSON, Mr. J. G. DRAKE, Secretary for Public Instruction of Queensland, succeeded him in the Government.

In addition to the principal personages who took part in the opening drama most of the leading federalists and distinguished public men of Australia, were present in the Park, silent spectators of the epoch-making scene.

There were seen, as honoured guests, members of the State Parliaments and the State Governments of Australia. There were in attendance a few of the surviving members of the National Australasian Convention of 1891 ; among them being Sir SAMUEL GRIFFITH (then, Chief Justice of Queensland who was destined to be the first Chief Justice of the High Court of Australia) and Mr. Justice INGLIS CLARK (of the Supreme Court of Tasmania) ; men who, in the Draft Bill of 1891, designed the framework of the Constitution ; also the whole of the members of the Statutory Federal Convention 1897-8 ; men who finally framed and settled the instrument of Government which afterwards became law by an Act of the Imperial Parliament. Among the other guests present were Mr. (afterwards Sir) GEO. H. REID ; to be the Leader of the first opposition in the Federal Parliament ; Prime Minister and eventually the first High Commissioner of the Commonwealth in London ; Mr. (afterwards Sir) JOSEPH COOK trusted lieutenant of Mr. REID and who became his successor as Leader of the Federal Opposition and afterwards Prime Minister. There was also present

Mr. J. C. WATSON who became the first Leader of the Labour Party in the Federal Parliament and Prime Minister of the first Labour Government ; also Mr. W. M. HUGHES, a distinguished member of the Labour Party and marked out by qualifications to be its Attorney-General and law adviser ; afterwards Prime Minister in three Governments. Mr. ANDREW FISHER, too, who afterwards took the place of Mr. WATSON as Leader of the Labour Party and became the Prime Minister of three Governments was present.

Mr. BERNARD R. WISE the Attorney-General of New South Wales who rendered valuable service to the Federal cause and Mr. ISAAC A. ISAACS, Attorney-General of Victoria ; afterwards Attorney-General of the Commonwealth and Justice of the High Court were there.

One picturesque figure once well-known and whose name will always be respected in Australia as a Federal leader, was missing—Sir HENRY PARKES. His remains were at rest in a lonely grave in the Blue Mountains, but his name was on many lips and was recalled with reverence. With keen vision he had, from his lofty Pisgah, viewed the promised Commonwealth, but he had not been permitted to enter it. When health and strength failed him, he had committed the cause of union to the faithful hands of Mr. (afterwards Sir) EDMUND BARTON. On such a great day as that Sir HENRY PARKES' magnetic appeal to "the crimson thread of kinship" must have been felt by all who realized its significance and Mr. BARTON's equally fine phrase, "a Continent for a people and a people for a Continent," must always find a place in the literary records of the Federal Movement.

### **The Queen's Message.**

Pulsating through the electric cable, attuned to the new impulse and throb of national life, came QUEEN VICTORIA'S noble message, transmitted by Mr. JOSEPH CHAMBERLAIN one of the greatest of Colonial Secretaries. The message was read by Lord HOPETOUN to the assembled multitude as follows :—" Her Majesty commands me to express through you to the people of Australia Her Majesty's heartfelt interest in the inauguration of the Commonwealth ; her earnest wish that under Divine Providence there may insure increased prosperity and well-being to her loyal and beloved subjects in Australia.—JOSEPH CHAMBERLAIN."

The Earl of HOPETOUN also read the following message from the Salisbury Government. " Her Majesty's Government sends cordial greetings to the Commonwealth of Australia. They welcome her to her place among the nations, united under her Majesty's Sovereignty ; and confidently anticipate for the new Federation a future of ever-increasing prosperity and influence. They recognize in the long-desired consummation of the hopes of patriotic Australians a further step in the direction of the permanent unity of the British Empire. They are satisfied that the wider powers and responsibilities henceforth the sphere of Australia will give further opportunity for the display of that generous loyalty to the throne and Empire which has characterized the action in the past of the several States "

### **The First Parliament.**

The first Federal Elections were held on the 29th March 1901. Each of the Australian States returned six Senators to represent them in the Senate—total 36. The people of the several States returned the following members to the House of Representatives, namely :—New South Wales 26, Victoria 23, Queensland 9, South Australia 7, Western Australia 5, Tasmania 5—Total 75. In the absence of Federal legislation the elections were conducted in each State according to the appropriate electoral laws and procedure in force in each State applicable to the State Legislature. One constitutional rule, however, was enforced, that in the choosing of members each elector should vote only once. Constitution, sec. 30.

Her Majesty QUEEN VICTORIA did not long survive the inauguration of the Commonwealth. As the Queen's first and last message to the Commonwealth was being read amid rapturous applause in Sydney, the angel of death was hovering over the Royal Palace. Her Majesty died on the 22nd January 1901, and EDWARD VII. became King. Pursuant to Her Majesty's desire expressed, that her grandson, then the DUKE OF CORNWELL AND YORK should visit Australia and attend the ceremony of the opening of the new Federal Parliament, arrangements were made to that effect with the approbation of KING EDWARD VII.

### **The King's Message.**

The ceremony of opening the first Session of the first Federal Parliament took place on the 9th May, 1901, in the Exhibition Building, Melbourne. Under commission from His Majesty, KING

EDWARD VII., His Royal Highness the DUKE OF CORNWELL AND YORK (now KING GEORGE V.) formally opened the Parliament.

The High Commissioner, representing the King, read a message which he had been commanded by His Majesty to deliver to the members of the New Parliament. In that message the following passages appeared :—

“ His Majesty has watched with the deepest interest the social and material progress made by his people in Australia, and has seen with thankfulness and heartfelt satisfaction the completion of that political union of which this Parliament is the embodiment.

“ The King is satisfied that the wisdom and patriotism which have characterized the exercise of the wide powers of self-government hitherto enjoyed by the Colonies will continue to be displayed in the exercise of the still wider powers with which the United Commonwealth has been endowed. His Majesty feels assured that the enjoyment of these powers will, if possible, enhance that loyalty and devotion to his throne and empire of which the people of Australia have already given such signal proofs.

“ It is His Majesty’s earnest prayer that this union, so happily achieved, may, under God’s blessing, prove an instrument for still further promoting the welfare and advancement of his subjects in Australia and for the strengthening and consolidation of his Empire.”

The members of the Senate and the House of Representatives then took the oath of allegiance. During the progress of the ceremony the High Commissioner read the following cablegram which he had received from the King :— “ My thoughts are with you in to-day’s important ceremony. Most fervently do I wish Australia prosperity and happiness.”

The ceremonial proceedings in the Exhibition Buildings having been completed the newly sworn in members repaired to their respective chambers in Parliament House, Melbourne. The members of the Senate elected Sir RICHARD CHAFFEY BAKER to be the first President of the Senate and the Members of the House of Representatives elected Mr. (afterwards Sir) FREDERICK HOLDER as Speaker of that body.

**Hopes and Promises.**

On the following day, 10th May, the Governor-General, the EARL OF HOPETOUN attended Parliament House and delivered his opening speech to the members of both Houses. In that speech the outlines were given of the proposed policy of the Australian Commonwealth. It is full of interest and its leading features are here given so that the ideals and promises of the first Federal Ministry may be compared with actual realizations in the shape of Federal laws passed by the first and the following Parliaments. It will be seen that almost without exception the forecast of legislation and policy outlined by the EARL OF HOPETOUN has been materialized in the shape of Federal laws and institutions now in actual force and existence. So that Federation, however disappointing in some of its phrases has been neither a dream nor a delusion but a great reality ; true to sample ; true to anticipation ; true to the ambitions and aspirations of its founders ; true to the best interests of the present and the future of Australia and the Empire.

Among the measures foreshadowed were the following : the unification and organization of the executive departments of the Federal Government ; the assimilation and re-enforcement of the defences of Australia ; the constitution and organization of the High Court ; the constitution of the Inter-State Commission ; the administration of the Federal Public Service ; uniform Customs and Excise laws ; uniform electoral laws and franchise ; the establishment of the Federal Capital ; the regulation of immigration and the institution of a policy of a White Australia ; the settlement of inter-state industrial disputes by conciliation and arbitration ; the introduction of invalid and old-age pensions ; the representation of the Commonwealth abroad ; up-to-date patent and copyright laws ; navigation, shipping and quarantine laws ; the construction of a trans-continental Railway connecting Western Australia with the Eastern States ; the federalization of the Northern Territory and New Guinea ; the assimilation of postal, telegraphic and telephonic regulations and the adoption of penny post.

If, from this summary of promised measures, the reader will turn to Chapter II. of this introductory review, he will at once perceive the faithful accomplishment of promises and the boldness,



originality, and immensity of legislative work which has distinguished the first eighteen years of Federal life and experience in Australia.

After eighteen years of eventful Federal history, we can engage in retrospect of accomplishments and realizations and compare them with the visions, the prophecies and ideals of pre-federal days. We can now contemplate Federation, not simply as a picture or as an abstract idea ; we see it in the living guise of its national life, power and organization ; in its laws and institutions ; in its machinery of Government ; in its lines, avenues and arteries of inter-communication ; all pulsating with vitality and energy ; all being materialized in bold relief and outline ; posing before the world in picturesque personality ; ranking with other young nations and dominions within the Empire.

### **Accomplishments.**

Amid the competition and struggle of political parties, amid the rapid succession of ministerial changes despite the conflict of free-traders and protectionists, liberals and conservatives, liberals and labourites, individualists and socialists, the work of foundation laying, fabric building and the redress of grievances has been going on. To their credit it must be said that all parties have assisted in filling in the outlines of our Federal institutions and in the passing of democratic legislation which has made the 15 volumes of Commonwealth Statutes the study of legislators, the admiration of jurists, and the envy of reformers in every other civilized country. With all the alleged defects of the Federal Constitution, its adaptability and responsiveness to Australian conditions have been attested by the activity of legislation, the swiftness with which desirable measures have been prepared and passed through the Federal Parliament, and the readiness of that Parliament to respond to the demands of the people.

During the last 18 years Australia has been a great field of pioneering and experimental legislation which has attracted the attention of students of political science throughout the world. Courage, leadership and statesmanship of a high order were needed to place on the Statute book such measures as adult suffrage, coupled with the abolition of plural voting ; the equalization of the sexes in the enjoyment of the rights of citizenship ; the settlement of the fiscal question on the basis of revenue combined with protection to native industries with a recognition of the principle

of preference to goods of British origin ; immigration exclusion laws for the preservation of the purity of the white races in Australia ; compulsory arbitration for the settlement of inter-state labour disputes ; the establishment of an Australian Citizens' Defence Force and an Australian Navy associated with the principle of obligatory training, drill and service ; a progressive land tax ; a Commonwealth note issue and a Commonwealth Bank. In the field of inter-state and external trade and commerce laws have been passed for the protection of the public against the operations of injurious trusts, combines and monopolies. In connection with inter-state and external navigation, laws have been passed for the protection of shippers of goods against the negligence of shipping companies engaged in the carriage of goods. Seamen are guaranteed against unfair treatment in their marine employment and are entitled to compensation in case of accident resulting in personal injuries. Invalid and old-age pensions are granted to the infirm and those in the declining years of life. Financial problems of great magnitude have been dealt with and for the time being settled. The States in return for the Customs and Excise revenue which they surrendered to the Commonwealth were on the termination of the 10 years Braddon Clause period were endowed with the grant of 25/- per head of their respective population for a farther term of 10 years.

In no field of Commonwealth life and development has the plenitude, magnitude and potency of national legislative powers been brought into such bold relief with such dramatic swiftness and impressiveness as that of defence. It is in this sphere that we see a strong and far-reaching manifestation of Commonwealth powers which have been wielded with sublime effect for the safety of Australia and the Empire. We see the war powers in operation at full speed, in full blast, with an efficiency and all-pervading activity on sea, on land, and in the air, that has surprised the enemy and delighted the best friends of Australia. They have displayed the new-born nation like Bellona's bridegroom in complete armour-clad, in full panoply, organizing its fleets and armies, despatching them to the theatre of naval and military activity across thousands of miles of wild, waste, wilderness of ocean. The mandate embodied in the simple but stirring word " Defence " interpreted by a wise statesmanship and administered under the inspiration of a noble patriotism have done all this.

The feats of Australian sailors and soldiers on the "Seven Seas" and on three Continents has commanded the admiration of the friends of freedom all over the world and has raised the name of Australia to the highest pinnacle of fame. In the lofty Empyrean of universal history the magic word "Anzac," has been emblazoned in flaming letters of fire which will never be obliterated. With the advent of Australia into the arena of this fate-deciding war, and with the display of its fighting strength that has so far lead on to immortal victories, Australia has, as a new nation, been visualized in bold and striking relief on the horizon of the Southern Hemisphere in a manner that would hardly have been realized during a hundred years of peaceful uneventful history.

The Commonwealth, as a legal entity, was established by law on the 1st January, 1901, but it received its baptism of fire on the blood-stained shores and heights of the Gallipoli Peninsula on the 25th April, 1915. The landing of Australian troops in proud association with the Allied forces marked the dedication and sanctification of Australian nationhood for all times.

### Unfolding the Constitution.

What, then, of the disappointments of Federation, about which so much has been heard? The first shock came in February, 1904, when the High Court of Australia, composed of Sir SAMUEL GRIFFITH, C.J., and Justices BARTON and O'CONNOR, gave a decision in the first great Constitutional case of *D'Emden v. Peddar*, (1904) 1 C.L.R., 91, which, it was said, struck a severe blow at the rights of the States. A similar ruling adverse to the rights of the States was given in *Webb v. Deakin*, 1 C.L.R., p. 585. These judgments, however, were, in 1907, confirmed and strengthened by the High Court in *Baxter v. The Commissioner of Taxes (N.S.W.)*, 4 C.L.R., 1087. There came another shock in an opposite direction in 1906 when the High Court in the case of the *Federated Amalgamated Government Railway and Tramway Association v. The New South Wales Traffic Association*, (1906) 4 C.L.R., 488, declared a Federal law trenching on the rights of the States to be null and void. These judgments will stand for all time as monuments of constitutional learning and master-pieces of judicial reasoning, packed with well marshalled arguments, showing an intuitive grasp and realization of the true meaning of the Constitution which the eminent men composing the Federal Convention helped to frame.

In truth, these and other similar judgments of the Court led to a gradual unfolding and illumination of the real significance of the Constitution and gave the people of the Commonwealth interesting object lessons in the working of our new Federal system of Government. An outcry was raised that the High Court was overriding the laws of the States in one direction and the laws of the Commonwealth in another. But in so passing on the validity of State and Federal laws the High Court was simply performing its functions as the Federal Court of Appeal and the guardian and interpreter of the Constitution. A fair study of that document shows that it does not centralize all the powers of Government but that whilst it unites in a federation what were formerly separate Colonies of Great Britain it creates a Federal Legislature to deal with Australian matters and preserves the State Legislatures to regulate the local and domestic affairs of each component part of the Federation. The sovereign power, as a whole, resides in the people of Australia as a whole, but the exercise of the sovereign power has been entrusted in part to the Federal Parliament and Government and in part to the States.

Story, the eminent American jurist, writing of the distribution of powers in the American Constitution said :—" Congress on the one hand, and the State Legislatures on the other are called into existence by the sovereign people to assist in carrying out the various purposes of Government to be accomplished. They are the people's substitutes and agents." *Story on the Constitution*, 5th ed., vol. 2, pp. 5, 6, 7.

Alexander Hamilton in *The Federalist*, No. 46, also wrote on similar lines :—" The Federal and State Governments are in fact but different agents and trustees of the people constituted with different powers and designated for different purposes."

The Australian Constitution having been framed on the American model these passages may be appropriately cited in illustration of its character. The Government of the Commonwealth, as distinct from the States, is one of enumerated powers. The specification of particular powers in the Constitution assigned to the Commonwealth excludes all pretensions of general legislative authority in the Commonwealth. The Federal Parliament is supreme in dealing with matters which are either expressly or by necessary implication given to it. The State Parliaments are supreme in dealing with

matters not taken from them or assigned to the Commonwealth. Such are the reserved powers of the States. If a State Parliament passed a law encroaching on the sphere of authority belonging to the Commonwealth or inconsistent with a valid Federal law, the High Court may, in a suit properly brought before it, declare such State law null and void and may refuse to enforce it; in fact, it is not a law; it is a nullity. So likewise if the Federal Parliament purports to pass a law encroaching on the sphere of authority reserved to the States or inconsistent with a valid State law, the High Court may in a suit properly brought before it declare the Federal law null and void and may refuse to enforce it. This was what was done by the Court in the cases cited.

Hence it is as useless as unjust and fatuous to protest against the judgments of the High Court. It is placed where it stands to maintain the balance of power between the two sets of legislative organs, Federal and State, and see that each keeps within the domain of usefulness assigned to it by the Constitution. The High Court is the keystone of the arch of the Federal system. Without such a judicial arbitrator, the whole scheme of government would crumble to ruin and end in chaos.

A federation is a political partnership in which the sovereign powers are divided among two sets of governing agencies, the Federal and the State. In a unified system such as that of Great Britain there is a centralization of all the governing powers in the King in Parliament. There is no partnership of powers as there is in the United States of America, the Dominion of Canada and the Commonwealth of Australia. The Parliament of Great Britain is supreme and absolute and no Court of law could declare its Statutes *ultra vires*. But the Supreme Court of the United States could declare an act of Congress or a State law, null and void as being in excess of its jurisdiction. So also the Supreme Court of Canada or the Privy Council could declare a Dominion or a Provincial Statute invalid. This is what has been done by the High Court of Australia in the exercise of similar judicial authority.

### **Nationalism and State Rights.**

Another group of critics have joined in a campaign against "State Rights" and in favour of "National Rights." They have strongly argued in support of proposed amendments of the Constitu-

tion for the enlargement of Federal powers and the contraction of the powers of the States. Great stress has been laid on the necessity of allowing the will of the nation as expressed by the Commonwealth Parliament to be supreme in all cases; to allow national rule to prevail over provincial rule. The cry of "Nationalism" and "National Rights" is a taking one and has many attractions, but it ought not to be based upon misleading conceptions.

The true nationalism of the people of Australia, is to be found in the union and sovereignty of the people rather than in the supremacy and predominance of the Federal Parliament. The House of Representatives is no doubt in form a national Chamber, but its powers are limited and subject to the rights of the Senate, which is a Federal Chamber. The Federal Parliament as a whole does not constitute the Commonwealth. The Commonwealth, according to the express words of the Constitution, is composed of the union of the people and the States. Whatever may be the national elements of the Commonwealth, they spring from its federalism, as expressed in the union of the people and the States. The States, as separate governing entities, are as much parts of the Commonwealth as the Federal Parliament and the Federal Executive. The correct theory of Australian federalism is not that the Federal Parliament is the supreme and sole representative of the national principle, but that the Commonwealth is a political union and partnership with a dual system of government. That union and partnership derives its authority ultimately from a common source; the sovereignty of the people, who, in State electorates send members to the State Parliaments and in Federal electorates send members to the Federal Parliament. They are the same people voting in different capacities. They are the same people—State in one capacity and Federal in another capacity. They are the same taxpayers between whom there is no antagonism. The States are integral parts of the whole. The vitality and success of the whole depends upon the vitality and success of the parts.

This is the ideal of federalism. In the words of Dr. Burgess, the eminent writer on the American Constitution, it reconciles the Imperialism of the Romans, the local autonomy of the Greeks, and the individual liberty of the Teutons. It preserves what is national, genuine, and enduring in each. An Australian nationalism springing from such a tripartite combination will be as potent and virile as any the world has yet seen. No true friend of Australian

Federation will take part in a campaign to unnecessarily reduce the influence, dignity, and usefulness of the States in order to enlarge the sphere of Federal authority beyond the practical requirements of national life.

### **Responsible Government and the Senate.**

During the Federal Campaign, two remarkable predictions, as to the possible political consequences of Federation under the Constitution were made by prominent public men, both of which have been negatived by experience. One was a statement by Sir RICHARD C. BAKER (afterwards President of the Senate) that "if we adopt this cabinet system it will either kill Federation or Federation will kill it." The cabinet system is the system of Executive known in the British Constitution as "Responsible Government." Now, the essence and characteristics of Responsible Government are as follows:—The appointment by the King of a Prime Minister, being a member of Parliament, authorized to form a Ministry (Cabinet) being Members of Parliament, to carry on the Executive Government of the country; the possession by that Ministry of the confidence of the national or popular chamber or chamber which has the initiation and control of supplies; the political unity and collective responsibility of the Ministry; the Ministry to have a common policy; the resignation of the Prime Minister to involve the resignation of the Ministry.

In Great Britain it has never been considered essential that the Ministry of the day should have the confidence of the House of Lords. Indeed, it is well known that for many years the Liberal Party, when in power in the House of Commons have been in a minority in the Chamber of Peers. That, however, has not been considered as fatal to Responsible Government, because the Government, strong in the House of Commons, has been generally able to persevere and hold office and, under good leadership, to induce the House of Lords to pass measures (even some which they disapprove of) shown to be demanded by the overwhelming verdict of the nation, expressed through a general election. Sir RICHARD C. BAKER took the point that an Executive based on the responsible ministry system was inconsistent with true federation. He argued that as the laws of the Federation could not be made and altered without the consent of a majority of the people, and also of a majority

of the States, both speaking by their representatives, why should not the same principle be applied to the no less important branch of the State authority—the Executive Government? “If,” he said “you give to one House the absolute control of the Executive—if you so arrange that that House shall appoint and dismiss the Executive—it does not matter what theoretical powers you give to the other House, the House which controls the Executive will rapidly assume to itself all power, and the other House will degenerate into a ceremony.” *The Executive in a Federation* 1897.

These views were to some extent supported by Dr. (now Sir A.) COCHBURN; Mr. (now Sir) J. H. GORDON; Mr. INGLIS (afterwards Justice) CLARK; and Mr. (afterwards Sir) G. W. HACKET. They generally contended that the Cabinet System of Executive was incompatible with Federation. Notwithstanding their advice and warnings the Cabinet System of Executive was adopted and for the simple reason that nothing better was seriously proposed.

We can now speak with the results and experience of 18 years to guide us and we can say that Federation has not killed the Cabinet nor has the Cabinet System killed Federation. Both are surviving and none the worse for their association. The Senate, except on one memorable occasion, the contest between the Senate and the Cook Administration in 1911 resulting in a double dissolution in which the Senate and the party supporting it were victorious, has cheerfully and loyally recognized the Cabinet System as the best and most practicable method of conducting the Government of the country. No question of State rights has arisen in connection with the formation or composition of any Federal Ministry. All that need be said is that every Prime Minister in forming his Cabinet has made an effort to so distribute the offices and honours at his disposal as to secure one or more representatives from each of the States of the Commonwealth. The only inconvenience experienced has been that in order to make room in the Cabinet for representatives of the whole of the six States, many strong and able men to be found in the larger representatives of the larger States have had to be left out.

Another prophecy published in a manifesto to the electors of Victoria in 1899 by Mr. H. B. (now Justice) HIGGINS and others, has not been fulfilled. It was as follows:—



“ There is every reason for predicting that this State's House will control the finances of Australia, and thereby control the Executive, make and unmake Ministries. It will have equal authority with the People's House, but a stronger position, and more power. The Senators are to have a longer tenure, more secure seats, greater prestige as being elected by a whole Colony, instead of by districts in a Colony. The Senate will be enabled to pursue a policy more steadily and continuously than the other House. To the stronger House in financial matters Ministers will gravitate and Ministries must bow. The tremendous initiating and guiding power which Ministries have, will be welded by the House of the minority, the Senate; and the dangerous position will arise in which one-fifth (or less) of the people of Australia, paying one-fifth (or less) of the taxes, will have three-fifths (or more) of the control of the expenditure.” *Manifesto to Electors of Victoria*, 1899.

These are remarkable words coming from a gentleman of such critical ability. His views and apprehensions represent the very pole of thought compared with those of Sir RICHARD C. BAKER. One of those gentlemen feared that the Senate would, under a Responsible Government be obliterated. The other was apprehensive that the Senate would, under the Constitution, be the predominant Chamber. Both of these extreme views have been contradicted by actual experience and by the verdict of history. The Senate has not, in every respect, come up to the ideals of the framers of the Constitution as a State House and a second Chamber of review but it has not degenerated into “ the ceremony ” predicted by Sir RICHARD C. BAKER, neither have Ministries yet had to “ gravitate towards or bow down ” to the Frankenstein depicted in such graphic terms by Mr. H. B. (now Justice) HIGGINS.

Federal experience has proved that the Senate is, in actual practice not a State House as it was designed by the Constitution to be. Its personal composition and political complexion as evolved by Federal elections are determined by party votes as much as the personal element and political views of the House of Representatives are so decided. After each general election the Senate generally becomes the reflex and replica of the House of Representatives. This was the case on the occasion of the Liberal debacle and Labour triumph after the double dissolution of Parliament in June 1914. This was also the case after the great National triumph and Labour defeat in May, 1917.

### **The Amending Power.**

During the Federal Campaign of 1898-9 the strongest opposition was offered to the Constitution on the ground of its alleged rigidity and the difficulty that would be experienced in practice in carrying alterations. It was argued that the conditions precedent to an amendment imposed by section 127, viz. :—an absolute majority in both Houses and a majority of people voting in the majority of States, enabled any amendment to be blocked either by the representatives in the Senate of a small minority of the Australian people, or by a small minority of the Australian people in the subsequent voting, should the Senate ever pass the amendment by an absolute majority of its members.

This criticism was based on the assumption that all proposed alterations of the Constitution would involve questions of State rights or State interests; that all proposed alterations would be adverse to the less populous States and that such States would systematically combine in voting against Constitutional changes. It ignored the fact that in the bulk of questions possibly arising the Australian people in all the States would have a community of interests or of sentiment either in supporting or of opposing modifications in the instrument of Government. It also lost sight of the cohesive force and practical working of the system of responsible government nor had it the prescience to forecast the possible evolution of two great Federal parties under whose influence most of the Constitutional references would become party questions, consequently that the people in the more populous and less populous States would vote "yes" or "no" in response to party cries and on strict party lines irrespective of State boundaries. This is what has actually happened.

We present elsewhere a tabulated statement showing the results of the various Constitutional references to the people. There have been, in all, four referenda occasions three of them in connection with general elections and one on a day apart from elections. In all eleven distinct and separate questions have been submitted to the people on these four different occasions. Two only of the proposed alterations of the Constitution have received the required number of affirmative votes. These were "the Senate Election Referendum" in October 1906 (see Constitution, section 13) and "the State Debts Referendum" in February 1910 (see Constitution,

section 105). Both these amendments secured the necessary numerical and State majorities. The "Financial Agreement Referendum" (1910) (see Constitution, section 87) was rejected by a numerical majority of 25,324 "noes," the majority in three of the States voting "yes," and the majority in three of the States voting "no." This amendment therefore failed on two grounds, viz. :— The want of a numerical majority and the want of a State majority. The Constitutional alterations submitted in April 1911, apart from an election, were rejected both by a numerical majority of noes and by a State majority of noes. The Constitutional alterations submitted in April 1913 were rejected by a numerical majority of noes ; there was an equality in the State voting, three States being for and three against. None of these amendments have, therefore, been lost through any rigidity of the Constitution.

### Commonwealth Referenda.

#### REFERENDUM, OCTOBER 1906.

Constitution, Section 13.

#### SENATE ELECTIONS ; ROTATION OF SENATORS.

STATE.	YES.	NO.	Majority for YES.	Majority for NO.
New South Wales ..	286,888	55,261	231,627	—
Victoria ..	282,739	57,487	225,252	—
Queensland ..	81,295	24,502	56,793	—
South Australia ..	54,297	8,121	46,176	—
Western Australia ..	34,736	9,274	25,462	—
Tasmania ..	34,056	7,825	26,231	—
Commonwealth ..	774,011	162,470	611,541	—

#### REFERENDUM, FEBRUARY 1910.

Constitution, Section 105.

#### STATE DEBTS.

STATE.	YES.	NO.	Majority for YES.	Majority for NO.
New South Wales ..	159,275	318,412	—	159,137
Victoria ..	279,392	153,148	126,244	—
Queensland ..	102,705	56,346	46,359	—
South Australia ..	72,985	26,742	46,243	—
Western Australia ..	57,367	21,437	35,930	—
Tasmania ..	43,329	10,186	33,143	—
Commonwealth ..	715,053	586,271	128,782	—

## REFERENDUM, FEBRUARY 1910.

Constitution, Section 87.

## THE FINANCIAL AGREEMENT.

STATES.	YES.	NO.	Majority for YES.	Majority for NO.
New South Wales ..	227,650	253,107	—	25,457
Victoria ..	200,165	242,119	—	41,954
Queensland ..	87,130	72,516	14,614	—
South Australia ..	49,352	51,250	—	1,898
Western Australia ..	49,050	30,392	18,658	—
Tasmania ..	32,167	21,454	10,713	—
Commonwealth ..	645,514	670,838	—	25,324

## REFERENDA, APRIL 1911.

Constitution, Section 51 (I.), (XX.), (XXXV.).

## (1) LEGISLATIVE POWERS.

STATE.	YES.	NO.	Majority for YES.	Majority for NO.
New South Wales ..	135,968	240,605	—	104,637
Victoria ..	170,288	270,390	—	100,102
Queensland ..	69,552	89,420	—	19,868
South Australia ..	50,358	81,904	—	31,546
Western Australia ..	33,043	27,185	5,858	—
Tasmania ..	24,147	33,200	—	9,053
Commonwealth ..	483,356	742,704	—	259,348

Constitution, Section 51 (XL). (New Sub-section).

## (2) MONOPOLIES.

STATE.	YES.	NO.	Majority for YES.	Majority for NO.
New South Wales ..	138,237	238,177	—	99,940
Victoria ..	171,453	268,743	—	97,290
Queensland ..	70,259	88,472	—	18,213
South Australia ..	50,835	81,479	—	30,644
Western Australia ..	33,592	26,561	7,031	—
Tasmania ..	24,292	32,960	—	8,668
Commonwealth ..	488,668	736,392	—	247,724

## REFERENDA, APRIL 1913.

Constitution, Section 51 (I.).

## (1) TRADE AND COMMERCE.

STATE.	YES.	NO.	Majority for YES.	Majority for NO.
New South Wales	317,848	359,418	—	41,570
Victoria ..	297,290	307,975	—	10,685
Queensland ..	146,187	122,813	23,374	—
South Australia ..	96,085	91,144	4,941	—
Western Australia ..	66,349	59,181	7,168	—
Tasmania ..	34,660	42,084	—	7,424
Commonwealth ..	958,419	982,615	—	24,196

Constitution, Section 51 (XL). (New Sub-section).

## (2) TRUSTS AND COMBINES.

STATE.	YES.	NO.	Majority for YES.	Majority for NO.
New South Wales ..	319,150	358,155	—	39,005
Victoria ..	301,729	305,268	—	3,539
Queensland ..	147,871	122,088	25,783	—
South Australia ..	96,400	90,185	6,215	—
Western Australia ..	67,342	58,312	9,030	—
Tasmania ..	34,839	41,935	—	7,096
Commonwealth ..	967,331	975,943	—	8,612

Constitution, Section 51 (XXXV. (A.) ).

## (3) ARBITRATION IN RAILWAY DISPUTES.

STATE.	YES.	NO.	Majority for YES.	Majority for NO.
New South Wales ..	316,928	361,743	—	44,815
Victoria ..	296,255	310,921	—	14,666
Queensland ..	146,521	123,859	22,662	—
South Australia ..	96,072	91,262	4,810	—
Western Australia ..	65,957	59,965	5,992	—
Tasmania ..	34,625	42,296	—	7,671
Commonwealth ..	956,358	990,046	—	33,688

## Constitution, Section 51 (xx.).

## (4) CORPORATIONS.

STATE.	YES.	NO.	Majority for YES.	Majority for NO.
New South Wales ..	317,668	361,255	—	43,587
Victoria ..	298,479	308,915	—	10,436
Queensland ..	146,936	123,632	23,304	—
South Australia ..	96,309	91,273	5,036	—
Western Australia ..	66,595	59,445	7,150	—
Tasmania ..	34,724	42,304	—	7,580
Commonwealth ..	960,711	986,824	—	26,113

## Constitution, Section 51 (xxxv.).

## (5) INDUSTRIAL MATTERS : LABOUR AND EMPLOYMENT.

STATE.	YES.	NO.	Majority for YES.	Majority for NO.
New South Wales ..	318,622	361,044	—	42,422
Victoria ..	297,892	309,804	—	11,912
Queensland ..	147,171	123,554	23,617	—
South Australia ..	96,626	91,361	5,265	—
Western Australia ..	66,451	59,612	6,839	—
Tasmania ..	34,839	42,236	—	7,397
Commonwealth ..	961,601	987,611	—	26,010

## Constitution, Section 51 (A.) (I.). (New Sub-section).

## (6) NATIONALIZATION OF MONOPOLIES.

STATE.	YES.	NO.	Majority for YES.	Majority for NO.
New South Wales ..	301,192	341,724	—	40,532
Victoria ..	287,379	298,326	—	10,947
Queensland ..	139,019	117,609	21,410	—
South Australia ..	91,411	86,915	4,496	—
Western Australia ..	64,988	57,184	7,804	—
Tasmania ..	33,176	40,189	—	7,013
Commonwealth ..	917,165	941,947	—	24,782

## CHAPTER II.

### COMMONWEALTH LEGISLATION.

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#### PART I.

#### ORGANIC LEGISLATION.

##### (1) ORGANIZATION OF THE EXECUTIVE.

##### **The Executive Power.**

By the Constitution the executive power of the Commonwealth is vested in the Governor-General and a Federal Executive Council (sections 61 and 62). The Governor-General is authorized to appoint political officers being members of the Federal Parliament and Ministers of State to administer such Departments of State as may be established (section 64). By the Constitution, section 65, it is enacted that until Parliament otherwise provides the number of Ministers of State shall not exceed seven, and by section 66 that the appropriation for ministerial salaries shall not be more than £12,000 per year until otherwise provided.

##### **Customs and Excise Department.**

The Departments of Customs and Excise in all the States, upon the Proclamation of the Commonwealth on 1st January, 1901, were automatically transferred to the Commonwealth under section 69 of the Constitution without any proclamation or executive Act, and they thereby came under the control of the Commonwealth Minister of Trade and Customs. All the Customs and Excise laws and the administrative regulations in force in the States temporarily remained in operation until the passing of the Commonwealth

Customs Administration Act 1901, which re-organized and unified the Customs and Excise services and rules and methods of administration. Customs Act 1901-16 ; Beer Excise Act 1901-12 ; Distillation Act 1901 ; Excise Act 1901 ; Spirit Act 1906-15. To the Customs Department is entrusted the administration of sub-departments dealing with quarantine, fisheries, analysis, sugar and other Bounties, light-houses, beacons and buoys and Inter-State Commission.

### **Naval and Military Department.**

In the exercise of power conferred by the Constitution, section 69, the separate Defence Departments Forces, Army, Navy and Armaments of the States were, in March 1901, by Proclamation, transferred to the control of the Commonwealth Minister of Defence.

By the Ministers of State Act 1915, the number of Ministers of State was increased from seven to eight and the annual lump sum appropriation to £13,650. This alteration was made in order to provide for the appointment of a Minister for the Navy. Mr. J. A. JENSEN became the first holder of this office.

### **Postal, Telegraphic and Telephonic Department.**

Under the Constitution, section 69, the separate State Postal and Telegraphic Departments were, by Proclamation dated 1st March 1901, amalgamated and taken over by the Federal Executive and placed under the control of the Federal Postmaster-General. On 1st December in the same year the Commonwealth Post and Telegraph Act 1901, came into operation and the State laws relating to administration which had been temporarily preserved ceased to operate and were superseded by Federal laws. The chief administration of the Department was vested in the Postmaster-General, a responsible Minister of Cabinet rank who has authority to delegate some of his powers to chief officers in the States commonly called Deputy Postmasters-General.

### **The Treasury.**

This Department dates from the Proclamation of the Commonwealth. It comprehends the following business branches :— Treasury supervision of revenue, finance and taxation ; invalid and old-age pensions ; maternity allowance ; government printing.



**Home and Territories.**

This Department was also created by Proclamation with the establishment of the Commonwealth. It was, for several years, charged with the following business :—Federal Capital ; Electoral Act ; Public Works ; Census and Statistics ; Meteorological Observations.

**Works and Railways.**

In July 1916, a Department of Works and Railways was formed which took over most of the functions of the Home Affairs.

**Law and Justice.**

The Attorney-General's Department was created by Proclamation on the 1st January, 1901. It deals with the following matters :—High Court business ; Court of Conciliation and Arbitration ; Patents ; Trade Marks ; Copyrights and Designs ; War Legislation.

By the Act, No. 28 of 1916, provision was made for the appointment of a Solicitor-General of the Commonwealth to perform such duties and functions as may be prescribed by any Act or as may be delegated to him by the Attorney-General in pursuance of any Act. The Attorney-General is authorized, in writing, to delegate to the Solicitor-General any of his powers and functions under any Act so that the delegated powers may be exercised by the Solicitor-General as fully and as effectively as by the Attorney-General. Under this legislation Sir ROBERT GARRAN became the first Solicitor-General.

**Prime Minister.**

A new Department under the supervision of the Prime Minister established by Proclamation on 30th December, 1911, is one of the latest additions to the Executive organization of the Commonwealth. It has taken over from the Home Affairs the supervision of the Public Service Commissioner's Office, the Audit Office from the Treasury ; the Executive Council from the External Affairs.

**Repatriation.**

This is the last created Department in the Commonwealth Government. By the Minister of State Act 1917 the number of Ministers was increased to nine, and the appropriation to £15,300 per year. This Act was passed to enable the appointment of a Minister for Repatriation. Senator E. D. MILLEN became the first Minister.

**Public Service.**

The Commonwealth Public Service Act 1902-11 has made permanent provision for the management of the public servants in the various Departments the appointment, discipline, promotion, retirement, or dismissal of public servants ; the conditions and tenure of their office ; the remuneration for their services ; the holding of examinations for the test of qualification for appointment and another entitling to promotion. The Public Service Commissioner assisted by a staff of inspectors has been appointed to perform important functions such as :—The classification of work ; the supervision of officers ; the conduct of examinations and tests ; and generally to preside over the service and to recommend to the Government any changes and improvements that may be deemed necessary.

**(2) ORGANIZATION OF THE LEGISLATURE.****The Legislative Power.**

The Constitution, Chapter I., established the Federal Parliament upon the bicameral system consisting of the Senate and the House of Representatives. In various sections beginning with the words " until the Parliament otherwise provides " the Constitution made temporary provisions in matters of organization and procedure such as :—The franchise ; the qualification of members and electors and the conduct of elections. These temporary provisions have since been superseded by Federal legislation which may now be deemed to be part of the Constitutional fabric.

**Electoral Procedure.**

The Commonwealth Electoral Act 1902-1911 made arrangements for the conduct of elections for the House of Representatives and the Senate. Each State is distributed into Electoral Division equal to the number of members of the House of Representatives requiring to be chosen therein ; in other words they are equal and single electorates in each of the States. The Senators are chosen by the people of each State voting as one electorate. None but enrolled electors are entitled to vote. No elector can vote more than once at each election. The mode of voting is by secret ballot except in the case of voting by post which, however, has since been repealed. Then follow provisions for the limitation of election expenses ; the prohibition of treating and undue influence ;

the polling ; the scrutiny ; the declaration of the poll ; the settlement of disputed elections by the Court of Disputed Returns. The Senate Election Act 1903 made provision for the filling of casual vacancies in the Senate.

The Constitution Alteration (Senate Election) Act 1906 alters the dates on which, by the rule of rotation, the office of Senator begins and ends.

The Representation Act 1905-11 makes permanent provision for determining the number of members for the House of Representatives to which the people of each State are entitled, making allowance for fluctuations of the population.

### **Qualification of Electors.**

The Commonwealth Electoral Franchise Act 1902 provides that the qualification for the right to vote in the choice of members of the Senate and the House of Representatives shall be as follows :—Adult British subjects of either sex who have lived in Australia for six months continuously. Aboriginal natives of Australia, Asia, Africa, or the Islands of the Pacific, except New Zealand, cannot vote at Federal elections unless they have acquired a right to vote at Elections for the Lower House of a State Parliament.

### **Qualification of Members.**

The qualification of members are the same as those of electors. The only disqualification of member additional to those prescribed by the Constitution is that no members of a State Parliament shall be qualified to be nominated as a candidate for the Senate or the House of Representatives.

### **Allowance to Members.**

Members have in section 48 of the Constitution a right to allowance for their services to be paid out of the Consolidated Revenue. The amount was fixed by that section at £400 per year until Parliament otherwise provides and Parliament has otherwise provided by increasing the allowance of Members to £600 per year except in the case of Members who are Ministers of State in receipt of Ministerial salaries ; they continued to receive £400 per year in addition to their official salaries. Parliamentary Allowances Act 1907.

### **The Privileges of Parliament.**

The privileges of Parliament are by section 49 of the Constitution, similar to those of the House of Commons until otherwise declared by Federal Statute law. The only privilege legislation so far passed is the Parliament Papers Act 1908 which provides that no action or proceeding, civil or criminal, shall lie against any person for publishing any document published under the authority of the Senate or the House of Representatives.

### **(3) ORGANIZATION OF THE JUDICIAL POWER.**

The judicial power of the Commonwealth is by the Constitution vested in the High Court, but, by Federal legislation, a Chief Justice and Justices have been appointed and original and appellate jurisdiction has been more fully defined and elaborated. Federal jurisdiction has been conferred on the several Courts of the States subject to the right of appeal to the High Court. The High Court has been given exclusive and final jurisdiction in all questions arising as to the limits *inter se* of the Constitutional powers of the Commonwealth and those of the States and any case involving such an issue upon being instituted in a State Court can be at once removed to the High Court.

Judiciary Act, No. 6 of 1903, section 4, made provision for the appointment of a Chief Justice and two Justices and the following became the first Judges of the High Court, viz., The Right Hon. Sir SAMUEL WALKER GRIFFITH, G.C.M.G., P.C., to be Chief Justice; the Right Hon. Sir EDMUND BARTON, G.C.M.G., P.C. and the Hon. RICHARD E. O'CONNOR, to be Justices of the High Court. By the Act, No. 5 of 1906, the number of Justices was increased to four, and the Hon. ISAAC A. ISAACS and the Hon. HENRY B. HIGGINS were appointed to fill the vacant places. By the Act, No. 31 of 1912, the number of Justices was increased to six and the Hon. F. G. DUFFY and the Hon. CHARLES POWERS were appointed. Mr. Justice O'CONNOR died in November 1912 and the Hon. GEORGE EDWARD RICH was appointed to succeed him in April 1913.

Incidental to the judicial power of the Commonwealth, legislation has been passed under the name of The High Court Procedure Act 1903-15 and the Evidence Act 1905.

Legislation in aid of the judicial power reserved to the States is embodied in the Service and Execution of Process Act 1901-12

which affords valuable facilities for the enforcement of civil judgments, the services of writs and summonses in civil cases and the execution of warrants for apprehension in criminal cases at the instance of litigants in one State against debtors and wrong-doers residing in or taking refuge in another State. The State Laws and Records Recognition Act 1901 is a fitting accompaniment to the principal measure.

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## PART II.

### GENERAL LEGISLATION.

#### Trade and Commerce.

The trade and commerce power vested in the Federal Parliament is probably the widest, most comprehensive and far-reaching of all the several distinct grants of legislative authority contained in the Constitution. It must not be confused with the taxing power but even without the special taxing power conferred, it could under the commerce power have imposed duties of Customs in the importation of goods. As illustrations of the immense sweep and range of the commerce power the following Federal Acts may be mentioned which owe their origin and legality to this grant of power.

The Sea Carriage of Goods Act 1904 gave legal remedy to the owners and shippers of goods which, whilst being conveyed in ships engaged in the inter-state or external trade have been lost or damaged through unseaworthiness of such ships or through negligence in their navigation.

The Secret Commissions Act 1905, makes it a punishable offence for agents of a principal engaged in inter-state or external trade (1) to accept any secret commission, gift, consideration or reward for anything done or forbearance observed in relating to his principal's affairs or (2) to buy from or sell to himself any goods for or on behalf of his principal without the knowledge or consent of his principal.

The Commerce (Trade Description) Act 1905, provides for the inspection of imports and exports, and for the promulgation of regulations prohibiting the importation into or the exportation

from the Commonwealth of specified goods unless there be applied to those goods in a prescribed manner a trade description of such a character and relating to such matters as may be prescribed.

The Seamen's Compensation Act 1911 is a striking example of the elasticity and all comprehensiveness of the commerce and navigation powers. It gives persons employed on board ships engaged in the inter-state or external trade a right against the owners to recover compensation for personal injuries sustained by accident in the course of their employment with or without proof of negligence.

The main provisions of the Australian Industries Preservation Act 1906-10, prohibit and penalise contracts, trusts and combines, in restraint of inter-state or external trade; they derive their validity from the Federal control over inter-State and external commerce.

The Inter-State Commission Act 1912 has been passed partly by the authority conferred by the Constitution, section 101 and partly in the exercise of the commerce power: section 51 (1.). The principal duties of the Commission are to execute and maintain within the Commonwealth the provisions of the Constitution relating to trade and commerce and of all laws made thereunder.

### **External Affairs and Relations.**

In the exercise of power conferred by the Constitution, section 51, sub-section xxx. "External Affairs," and sub-section xxx. "Relations of the Commonwealth with the islands of the Pacific," three Acts have been passed of great importance, significant of Commonwealth influence expansion and representation abroad having in some respects extra-territorial operation.

The Extradition Act 1903, provides for the surrender to foreign countries of fugitive criminals found and arrested in the Commonwealth for crimes committed in such foreign countries and for the requisition by the Commonwealth for the surrender to the Commonwealth of fugitive criminals accused of crimes committed in the Commonwealth and arrested in other countries.

The Pacific Islands Labourers' Act 1901-06 made laws for the restriction and prohibition of the introduction of labourers from the Pacific Islands into Australia. It gave the Minister power subject

to exceptions defined in the Act of 1906 to order the deportation and return to the Islands of any native inhabitant of such Islands found in Australia after the 31st December 1906.

The High Commissioner Act 1909 authorized the appointment of a representative and agent of the Commonwealth in the United Kingdom to perform such duties as may be assigned to him by the Governor-General. The Right Hon. Sir GEORGE REID was appointed the first High Commissioner and in October 1915 he was succeeded by the Right Hon. ANDREW FISHER.

### **Postal, Telegraphic and Telephonic Service.**

The Post and Telegraph Act 1901-12 made laws for the conduct of the Postal, Telegraphic and Telephonic Services. The Postal and Telegraph Rates Act of the 1st November 1902 and the Postal Rates Act of 1912 established uniformity throughout the Commonwealth in the rates charged (1) for the transmission of newspapers by post ; (2) for the transmission of messages by telegraph ; and (3) for the transmission of letters, cards, parcels, and books, by post.

The Wireless Telegraphy Act 1905 gave to the Postmaster-General the exclusive privilege of establishing and maintaining stations and appliances for the purposes of transmitting and receiving messages by wireless telegraphy.

The Telegraphic Act 1909 enabled the Governor-General in case of emergency to authorize any officer of the Commonwealth to assume possession of and take control of any submarine cable or any wireless telegraph or any telephone within the Commonwealth.

The Pacific Cable Act 1911 gave authority to the Pacific Cable Board to construct and work a submarine cable between Doubtless Bay, New Zealand and Australia.

### **Naval and Military Defence.**

The Federal system of defence by land and by sea and the command thereof, its organization and discipline, compulsory military training drill and service is elaborated in the Defence Act 1903-15 ; Naval Defence Act 1910-12. The land forces have been unified, systematized and strengthened. In the first Defence Act 1903, the command of the Military Forces of the Commonwealth was entrusted to the General Officer Commanding and that of the

naval forces to the Naval Officer Commanding. By later legislation these commanders were dispensed with and the Governor-General has constituted a Council of Defence and a Board of Administration for the military forces called the Military Board and a Board of Administration for the naval force called the Naval Board, having such functions as are prescribed by regulation. In time of war the Governor-General may place the defence force or any part thereof under the orders of the Commander of any portion of the King's regular forces or the King's regular naval forces as the case may be. There is also an Inspector-General for the military forces and a Director of the naval forces: Defence Act 1903-1912, sections 8 and 28. Whenever the Commonwealth naval forces are acting with the King's naval forces the forces so acting together are deemed to be one force and are to be in the command of the Senior Naval Officer present acting in command: Naval Defence Act 1911, section 3.

The Naval Agreement and Subsidy Act 1903 providing a contribution of £200,000 per year towards the British Fleet has been superseded by the assumption of direct responsibilities for and direct control over naval defence in Australian waters and the establishment of a Royal Australian Navy under the name of a Fleet Unit.

In addition to the ordinary powers conferred on the Government under the Defence Act 1903-17 extraordinary war powers have been granted by the following Acts, viz. :—

War Precautions Act 1914-15.

Trading with the Enemy Act 1914-16.

War Loan Act 1914-17.

Enemy Contracts Annulment Act 1915.

War Census Act 1915-16.

Australian Soldiers' Repatriation Fund Act 1916.

Unlawful Association Act 1916-17.

War-Time Profits Act 1917.

Australian Soldiers' Repatriation Act 1917

War Pensions Act 1914-1916.

Wheat Storage Act 1917.

### **Coinage, Currency and Legal Tender.**

The Commonwealth has, so far, taken no action to assume the control of the coinage of gold which at present is being carried on



in the branches of the Royal Mint existing in New South Wales, Victoria and West Australia which are subsidized by the State Governments.

The Coinage Act passed in 1909 provided that the future Australian coinage should consist of the following coins :—In gold, £5, £2, £1, and 10s. ; in silver, 2s., 1s., 6d., and 3d. ; and in bronze, 1d. and  $\frac{1}{2}$ d. Gold was made a legal tender up to any amount, silver up to 40s., and bronze up to 1s. Ultimately the coinage was to be undertaken in Australia, but for the time an agreement was made with the authorities of the Royal Mint in London for the coinage of silver and copper coin in London, to be shipped to Australia as required, the old silver and copper coin was to be gradually withdrawn from circulation in Australia. Considerable revenue is being derived from the profits made by the coinage of silver and copper. The profits so far having been £347,297 from silver coin and £12,423 from bronze coin.

#### **Commonwealth Note Issue.**

By the Australian Notes Act 1910 the Commonwealth Treasurer was empowered to issue notes to be a legal tender throughout the Commonwealth and redeemable at the Seat of Government. The denominations of the notes were to be from 10/- up to £100 each. The Act directed the Treasurer to hold the following reserve of gold coin as security for payment of the notes, viz. : (a) An amount not less than quarter of the amount of notes issued up to seven million pounds and (b) an amount equal to the amount of Australian Notes issued in excess of seven millions pounds. By the Amending Act of 1911, No. 21, the reserve clause was altered to read as follows :—“ The Treasurer shall hold in gold coin a reserve of not less than quarter of the amount of Australian Notes issued.” This amendment was intended to come into force on the 1st July, 1912. Its operation was afterwards deferred until the Commonwealth elections 1913. These elections resulted in the return to power of another Administration and the new Treasurer, Sir JOHN (afterwards Lord) FORREST announced his intention, during his tenure in office, of maintaining the reserve at the rate provided in the original Act. He went out of office in September 1914 ; but since then there has been a very great change in the proportionate gold reserve.

On 30th June, 1916, the value of the notes issued and unredeemed was £45,057,616, against which there was a gold reserve of £16,262,693, leaving an uncovered amount of £28,794,923.

At the end of August 1918, Australian notes to the value of no less than £54,552,794 had been issued and were not redeemed. As against this issue there was a gold reserve of £17,659,754 leaving an uncovered amount of £36,893,040.

It thus appears that a large proportion of the notes—all of which are payable on demand—is permanently uncovered by gold, and this proportion constitutes an undoubted part of the public debt. This item is constantly fluctuating in amount, and financially resembles a bank overdraft on which no interest is payable. No reference has been made to the uncovered notes in the tables officially summarising the public debt.

### **The Commonwealth Bank.**

By an Act passed in 1911 provision was made for the creation of a Commonwealth Bank authorized to carry on Savings Banks ordinary banking as well as Government banking business. It was not empowered to issue bank notes but in other respects it had the functions of an ordinary bank of issue. It was to be managed by a Governor and a Deputy-Governor to be appointed by the Governor-General. The capital of the bank was originally fixed at £1,000,000 sterling to be raised by the issue and sale of debentures. In 1914 an Act was passed to increase the capital of the bank to £10,000,000 but no additional capital has, up to the present, been advanced by the Commonwealth Government to the Bank. The first step in the organization of the bank was to appoint as Governor Mr. DENNISON MILLER of the Bank of New South Wales and Mr. JAMES KELL of the Bank of Australasia was subsequently appointed Deputy-Governor.

### **Bounties.**

In the exercise of exclusive power to grant bonuses or bounties on the production or export of goods the following Acts have been passed, namely :—Sugar Bounty Act 1903 ; 1905 ; 1912 ; Bounties Act 1907 ; Cotton and fibres—flax and hemp ; jute ; sisal-hemp ; oil raw materials ; cotton-seed ; linseed (flax seed) ; rice ; rubber ; coffee, raw ; fish, preserved ; fruits dried ; combed wool or tops.

Manufacturers' Iron-work Encouragement Act 1908-12. Iron Bounty Act 1914-1915. Shale Oil Bounties Act 1910. Wood Pulp and Rock Phosphate Act 1912.

### **Insurance.**

The Life Insurance Companies Act 1905 limited the amount of insurance money payable on the death of a child and prohibited the payment of insurance money on the death of a child to any person except the parent or the person representative of a parent. The Marine Insurance Act 1909 contains a consolidation of the laws relating to this branch of Insurance.

### **Bills of Exchange and Promissory Notes.**

The Bills of Exchange Act 1909-12 is a codification of the law relating to this branch of negotiable instruments based on the English model.

### **Copyrights, Patents, Designs and Trade Marks.**

Up-to-date legislation on these subjects are to be found in the Customs Act 1901-10, section 52A ; the Patents Act 1903-9 ; the Trade Marks Act 1905-12 ; the Designs Act 1906-12 ; the Patents, Trade Marks and Designs Act 1910-1914 ; Copyright Act 1905-12.

### **Exclusion and Naturalization Laws.**

Legislation to regulate immigration and emigration and the exclusion from Australia of undesirable and unhealthy persons, including paupers and criminals, is to be found in the Immigration Act 1901-12 ; The Pacific Islands Labourers Act 1901-6. Desirable aliens of good repute and qualified by residence may be naturalized and admitted to citizenship but not as a right.

### **Industrial Laws.**

The Commonwealth Conciliation and Arbitration Act 1904-15 utilizes to the fullest extent the limited Federal control over labour and employment conferred by section 51 (xxxv.). It vests in a Court consisting of a President, the authority to prevent and settle by conciliation and arbitration industrial disputes extending beyond the limits of any one State. One of the principal and unexpected features of this legislation has been the authorization and creation of a network of industrial associations or organizations having the conduct of labour and employment matters in the interests of and on behalf of employers and workers.

The difficulties of interpretation of the grant of power have been very great, raising such questions as the extension of the Act to State railways and State tramways ; preference to unionists ; the union badge ; attempts to make general regulations or common rules ; attempts to make the Federal awards supersede the determination of State Wages Boards ; the extent to which the High Court can control the proceedings of the Arbitration Court by a writ of prohibition.

In connection with the naval and military service, the Commonwealth public service and works and railways within the Federal Territories, including the Federal Capital, Federal control over labour and employment is of course unfettered.

#### **Invalid and Old-Age Pensions and Maternity Allowance.**

The liberality of the Invalid and Old-Age Pensions Act 1908-12 passed pursuant to the express provisions of the Constitution, section 51 (xxiii.) and the Maternity Allowance Act 1912, passed in pursuance of sub-section xxxix. and section 81 (the appropriating power) is shown by papers presented to Parliament in connection with the Budget of 1918.

#### **Shipping, Navigation and Lighthouses.**

Some indication of the great extent of Federal control over navigation and shipping and sea-borne trade and commerce (inter-state and external) and those engaged in it are afforded by the Sea Carriage of Goods Act 1904 ; the Seamen's Compensation Act 1911 ; the Navigation Act 1912 reserved for the Royal Assent ; the Lighthouse Act 1911-15 ; the Inter-State Commission Act 1912 and in the awards of the Commonwealth Court of Conciliation and Arbitration in maritime enterprises under the industrial legislation authorized by the Constitution, section 51 (xxv.).

#### **Acquisition of Land.**

By the Land Acquisition Act 1909 the Commonwealth was authorized to acquire any land required for public purposes. Such land may be acquired either by agreement with the owner or by compulsory process.

#### **Inter-State Rivers.**

The power of the Commonwealth over inter-state rivers and navigation is illustrated in the River Murray Water Act 1915, which ratified an agreement entered into between the Prime Minister

of the Commonwealth and the States of New South Wales, Victoria and South Australia for the appointment of an Inter-State Commission authorized to construct works necessary for the storage and distribution of the waters of the River Murray.

### **Federal Capital and Territories.**

The control of the Commonwealth over Federal Territories is exercised in such legislation as the following :—

Papua Government Act 1905.

Seat of Government Acceptance Act 1909.

Northern Territory Acceptance Act 1910.

Northern Territory Administration Act 1910.

Seat of Government Administration Act 1910.

Norfolk Island Act 1913.

### **Seat of Government.**

Seat of Government Acceptance Act 1909 and the Seat of Government Administration Act 1910 provided for the establishment and organization of the Federal Capital. Already about £1,742,632 has been spent in this great enterprise.

### **Northern Territory.**

On the 7th November, 1907, the Commonwealth and the State of South Australia entered into an agreement for the surrender to and acceptance by the Commonwealth of the Northern Territory, subject to approval by the Parliaments of the Commonwealth and the State. This approval was given by the South Australian Parliament under the Northern Territory Surrender Act 1907 (assented to on the 14th May, 1908) and by the Commonwealth Parliament under the Northern Territory Acceptance Act 1910 (assented to on the 16th November, 1910). The Territory accordingly was transferred by Proclamation to the Commonwealth on the 1st January, 1911.

It is a territory under the Commonwealth Constitution, Section 122, but is not a part of the Commonwealth under covering clause VI.

The Commonwealth has assumed liability for payment of loans previously contracted by South Australia in connection with the Northern Territory. It has also assumed entire responsibility for the Administration of the Territory and the Port Augusta and Oodnadatta Railway. The debts and liabilities taken over by the Commonwealth were as follows :—Loans £3,657,836 ; railway responsibility £2,274,486 ; total £5,932,322.

**Papua.**

On the 16th November, 1908, Papua or British New Guinea was placed under the Administration of the Commonwealth; it is under the Commonwealth but not a part of the Commonwealth which has since contributed the sum of £30,000 per year towards the Government and protection of this territory: Constitution, Section 122.

**Commonwealth Railways.**

The construction and taking over and maintenance of railways was authorized by the following Acts:—

Kalgoorlie to Port Augusta: Railway Survey Act 1907.

Kalgoorlie to Port Augusta: Railway Act 1911-12.

Port Darwin to Pine Creek: Northern Territory Act 1910.

Pine Creek to Katherine River: Railway Survey Act 1912.

Pine Creek to Katherine River: Railway Act 1913.

The Commonwealth Railway Act 1917 made permanent provision for the management of Federal railways.

The railway built by South Australia from Port Darwin to Pine Creek, 146 miles, first came under the jurisdiction of the Department of External Affairs, and was worked under the Administrator of the Northern Territory. On the 1st July, 1915, the management of the line was handed over to the Commonwealth Railway Department.

In the Northern Territory Acceptance Act, the construction of a trans-continental line from South Australia to the Northern Territory is provided for. The line has been extended from Pine Creek to Katherine River. The total cost of the line from Darwin to Katherine River has been £1,625,244. The connecting line from Katherine River to Oodnadatta is in course of survey.

The line from Port Augusta to Oodnadatta, 478 miles, built by the State of South Australia was taken over by the Commonwealth Government from 1st January, 1911, but was held under lease by the South Australian Government until 31st December 1913. It is provided in the Northern Territory Acceptance Act that the Commonwealth shall annually reimburse the State with the interest payable on the amount of loans raised by the State for the purpose of constructing the railway and the agreement for working the line prescribed that the Commonwealth is responsible

to the State for any financial loss incurred by the State in the working and management of the railway, but is entitled to receive from the State any profit made in such working and management.

The line from Queanbeyan, New South Wales, to Canberra, Federal Territory, five miles, was built by the Railway Construction Branch of the Public Works Department, New South Wales, and was completed and taken over by the Chief Commissioner of Railways for that State, who has, for the time being, agreed with the Commonwealth Government to work it. The line was opened for Commonwealth departmental goods traffic on 25th May, 1914. Capital cost £50,000.

The trans-continental line, Kalgoorlie to Port Augusta, 1,053 miles, built by the Commonwealth at a cost of £7,123,744 was opened for traffic on the 22nd day of October, 1917.

#### **Legislation with Respect to Contracts.**

There is no general grant to the Federal Parliament of power to legislate respecting contracts made within the States, but it has full and unlimited authority to do so respecting contracts made within the Federal Territories, the Seat of Government and with respect to inter-state and external trade, and with regard to Federal business and services.

The general power over contracts is still reserved to the States. There are, however, several specific assignments of such power which have been exercised in the following Federal Acts :—

Constitution, Section 51 (xxii.) : Coinage (Legal Tender) Act 1909.

Constitution, Section 51 (xiii.) : Australian Notes (Legal Tender) Act 1910-11 ; Commonwealth Bank Act 1911.

Constitution, Section 51 (xiv.) : Life Insurance Companies Act 1905 ; Marine Insurance Act 1909.

Constitution Section 51 (xvi.) : Bills of Exchange and Promissory Notes Act 1909-12.

There is an indirect or implied grant of power to the Federal Parliament to regulate contracts in connection with the inter-State and external trade and commerce : Section 51 (i.). Thus the Sea Carriage of Goods Act 1904 declares what shall be the implied conditions or warranties of a bill of lading, and what clauses shall

be prohibited in a bill of lading, preventing persons from contracting themselves out of the benefits and protection of the Act. The Australian Industries Preservation Act 1906-10, sections 4 to 7, 7A and 7B prohibit and declare illegal any trusts, combines or refusals to deal, in restraint or monopoly of inter-state or external trade. The Contract Immigrants Act 1905 declares that agreements made by persons outside Australia to perform manual labour within Australia upon arrival in Australia are absolutely void and unenforceable in Australia unless made in conformity with the conditions of the Act.

### **Actionable Wrongs Independent of Contracts.**

The Federal Parliament has no general authority to pass laws respecting torts or wrongs (such as negligence) committed within any of the States but it has an unqualified jurisdiction to do so in relation to the Commonwealth Public Service, the Naval and Military Forces and within the Seat of Government and in other Federal Territories. Parliament has, however, an incidental but limited power to attach sanctions to and provide remedies for the violation of rights and the neglect of duties imposed in the exercise of direct grants of power such as in connection with inter-state and external trade and commerce; inter-state shipping and navigation. This legislative authority is illustrated in the following Acts :—

Sea Carriage of Goods Act 1904 (negligence and unseaworthiness).

Seamen's Compensation Act 1911 (injury by accident).

Patent Act 1903-9 (damages for infringement).

Trade Marks Act 1905-12 (damages for infringement).

Designs Act 1906-12 (damages for infringement).

Copyright Act 1912 (right to prevent violation).

Commonwealth Workmen's Compensation Act 1912 (injury by accident whilst employed in the public service or in Federal territories).

### **Legislation Respecting Offences Against the Commonwealth.**

As in the matter of civil wrongs so with reference to the law of crimes, the Federal Parliament has no unmeasured power within the realm of criminal jurisdiction.

The Commonwealth Crimes Act 1914 codifies the possible offences and crimes against Federal law with the punishment for breach which is to follow conviction.



**Statutory Adoption of Common Law Rules.**

The question as to whether there can be a Federal common law independent of Federal legislation is referred to under a separate heading (*post*) "Judicial Interpretation." Under the heading of "Federal Legislation" it is appropriate to mention that in the exercise of its legislative powers to deal with definite subject matters the Parliament of the Commonwealth has adopted and incorporated in several Acts, common law rules, principles and methods by reference only and not by definition. Thus the Judiciary Act, No. 6 of 1903, section 80, provides that so far as the laws of the Commonwealth are not applicable or so far as their provisions are insufficient to carry them into effect, or to provide adequate remedies or punishment, the common law of England as modified by the Constitution and by the Statute law in force in the State in which the Court in which the jurisdiction is exercised is held, shall, so far as it is applicable and not inconsistent with the Constitution and the laws of the Commonwealth govern all Courts exercising Federal jurisdiction in the exercise of their jurisdiction in civil and criminal matters.

The Copyright Act 1905, section 7, declares that the common law of England relating to proprietary rights in unpublished literary compositions shall, after the commencement of this Act apply throughout the Commonwealth.

The Trade Marks Act 1905, section 5, provides that the common law of England relating to trade marks shall, after the commencement of this Act, apply throughout the Commonwealth.

The Bills of Exchange Act 1909-12, section 5 (2) enacts that the rules of common law, including the law merchant, save in so far as they are inconsistent with the express provisions of this Act, shall continue to apply to bills of exchange, cheques, and promissory notes.

The Marine Insurance Act 1909, section 4, provides that the rules of the common law, including the law merchant, save in so far as they are inconsistent with the express provisions of this Act, shall apply to contracts of marine insurance.

The Crimes Act, No. 12 of 1914, section 4, provides :—"The principles of the common law with respect to criminal liability shall, subject to this Act, apply in relation to offences against this Act."

## PART III.

## LEGISLATION RESPECTING FINANCE.

**The Taxing and Spending Powers.**

The powers vested in the Commonwealth which have caused most surprise and yielded the most unexpected results are the taxing power, section 51 (II.) and the spending power, section 81. These powers are practically unlimited save that Federal taxation must not discriminate between States and money must be appropriated for the purposes of the Commonwealth. Avoiding the rule against discrimination the Federal Parliament could impose taxation in every shape and form, direct and indirect, to the monopoly of all sources of revenue and to the exclusion and eventual destruction of the States. The gradual extension of Federal taxation and its infringement on the original tax-gathering preserves of the States is shown in the exclusive Federal control over customs and excise duties and in the double land tax (Federal and State), in the double income tax (Federal and State), in the double death and succession duty (Federal and State). The Federal Parliament has also anticipated the States in imposing an Entertainment Tax. The process of Federal taxation may go on widening and extending until it gradually covers the whole field of possible financial resources; then will come the great day of reckoning and the States may find themselves crippled in their finances and compelled to retrench and reduce their widening functions and expense.

The spending power of the Commonwealth is not restricted to the purposes of legislation, defined by section 51 but appears to be unlimited save by its own discretion, the paying capacity of the tax-payers and in the last resort, by the ballot-box. No Court of law could possibly prevent the Federal Parliament appropriating money for any purpose under the sun. This boundless power of appropriation is illustrated in the Maternity Bonus Act, the Polar Expedition Grant, the Belgian Grant, the proposed Bureau of Agriculture and the proposed Bureau of Science. Similar elasticity in the spending power has been discovered in the Constitution of the United States where the Union Government is gradually overshadowing and superseding the Governments of the States in vast financial appropriations as powerful and effective in their operations

and results as if the Union had acquired additional Constitutional powers by an amendment of the instrument of government. The same developments are going on within the limits of the Commonwealth of Australia

With such boundless taxing and spending powers it is not surprising to find that the federal income from taxation, strictly so called, as distinguished from fees and charges for services rendered, has increased from the sum of £8,894,319 collected in the first year of federal history exclusively from customs and excise duties, to the sum of £16,587,906 in the year 1913-14 immediately preceding the declaration of war collected from Customs, excise and direct taxation. Yet for the first ten years of that history there was a constitutional limit or break on Commonwealth expenditure out of revenue derived from customs and excise duties. After the year 1910 that break or limit was removed. That break or limit and its eventual removal will now be explained in detail.

### **Commonwealth and State Finance.**

Two of the prominent provisions of the financial scheme of the Constitution were section 87, known as the "Braddon clause" and sections 89 and 93 known as "the book-keeping clauses." Section 87 provides that "during the period of ten years after the establishment of the Commonwealth and thereafter until the Parliament otherwise provides, of the net revenue of the Commonwealth from duties of customs and of excise not more than one-fourth shall be applied annually by the Commonwealth towards its expenditure. The balance shall, in accordance with this Constitution, be paid to the several States, or applied to the payment of interest on debts of the several States taken over by the Commonwealth."

Section 93 provides that "during the first five years after the imposition of uniform duties of customs and thereafter until the Parliament otherwise provides, the Commonwealth shall credit revenue, debit expenditure and pay balances to the several States as prescribed by the period preceding the imposition of uniform duties of customs." The mode of crediting revenue and debiting expenditure was prescribed as follows :—

- "(1.) The Commonwealth shall credit to each State the revenues collected therein by the Commonwealth.

“(II.) The Commonwealth shall debit to each State—

(a) The expenditure therein of the Commonwealth incurred solely for the maintenance or continuance as at the time of transfer of any department transferred from the State to the Commonwealth.

(b) The proportion of the State, according to the number of its people, in other expenditure of the Commonwealth.

“(III.) The Commonwealth shall pay to each State month by month the balance (if any) in favour of the State.”

### Commonwealth Expenditure.

The application by the Commonwealth Government of the revenue collected by it under this system was naturally grouped under three separate headings :—(a) Expenditure in services and departments transferred by the States to and accepted by the Commonwealth, such as, Defence, Customs and Excise, Postmaster-General, etc. (b) Expenditure on new departments and services arising from Federation, viz., The Governor-General, Parliament, Home Affairs, External Affairs, etc. (c) Payment to the States of surplus revenue in consideration of the surrender of customs and excise. See first two Commonwealth balance-sheets, *infra*, p. 50.

Of these three groups only (a) and (b) involved actual expenditure by the Commonwealth ; group (c) being merely a transfer of money to the States as a subsidy to be used by the States. During the transition period the expenditure on transferred services was debited to the several States in respect of which such expenditure was incurred, while the expenditure on new departments and services was distributed *per capita*. Surplus Commonwealth revenue was paid to the States monthly. Until the end of the year 1903-4, new public works, in the transferred departments were treated as transferred expenditure, and were charged to the States on whose behalf the expenditure had been incurred. In subsequent years all such expenditure was regarded as expenditure on new services, and was distributed amongst the States *per capita*.

This method of crediting and debiting was known as the “book-keeping system.” By section 94, after five years from the imposition of uniform duties of customs, the Parliament could provide “on such basis as it deemed fair, for the monthly payment to the several States of all surplus revenue of the Commonwealth.”

The book-keeping system lasted five years, but the "Braddon clause" or the "federal fourth limit" of expenditure lasted ten years. The Surplus Revenue Act 1908 declared that the provisions of the Constitution, section 93, should expire on the 13th June, 1908, and it made temporary provision in substitution of the book-keeping system. The Surplus Revenue Act 1910 repealed the greater part of the Act of 1908 and provided for the termination of the "Braddon clause" as from 31st December, 1910, and for the payment to the States of 25/- per head of the population until 30th June 1920. Western Australia and Tasmania have received special grants.

Under the new system of keeping the accounts there is no further crediting revenue and debiting of expenditure to the several States. The whole of the revenue and expenditure of the Commonwealth are now federalized and the States receive definite subsidies, not indefinite and varying monthly balances.

The annual subsidies paid to the States under the 25/- per head agreement have been as follows :—

1915-16 = £6,256,995

1916-17 = £6,180,419

1917-18 = £6,250,374

### **Transferred Properties.**

The Commonwealth at its establishment took over from the States a large number of properties such as, post offices, customs houses and naval and military works originally belonging to the State Governments. A valuation was made and the value of such property was assessed at £11,202,515; the entire responsibility for this capital sum has been assumed by the Commonwealth which in the meantime pays interest thereon to the States, amounting during the year 1916-1917 to £377,508.

### **Commonwealth Revenue.**

Any classification of the revenues of the Commonwealth which does not differentiate between money derived from taxation from money derived from services, registration fees, and other sources would be a very imperfect and misleading one. Revenue demanded and received by the Government in the shape of taxation such as a land tax is a burden imposed on the people without consideration,

except the ordinary rights of citizenship. On the other hand revenue collected by the Postmaster-General for carrying letters and sending telegrams is not taxation in any shape or form. A fee paid for registering a patent cannot be regarded as a tax on the brains of the inventor. It is simply a contribution towards the working expenses of the patent office in return for which a patentee receives the organized protection and hallmark of the Government. It is money paid and received for services rendered. The payment may be moderate or excessive, but in no sense can it be regarded as a tax. If the same service were rendered by a private corporation, a similar remuneration would probably be demanded.

### **Taxation and Services.**

In the exercise of the taxing power Parliament has passed the following Acts for the imposition of taxation, viz. :—

Customs Duties Tariff Acts 1902-17.

Excise Duties Tariff Act 1902-5-8.

Excise Duties Spirit Tariff Act 1906.

Sugar Excise Act 1910.

Bank Notes Tax Act 1910.

Land Tax Act 1910.

Income Tax 1915-16.

Estate (Probate and Succession) Duties Act 1914-15.

Entertainment Tax Act 1916.

War Time Profit Tax Act 1917.

Subjoined will be found tabulated statements A. and B., showing in contrast the revenue received by the Commonwealth during several years as the result of taxation and revenue received during the same period for services and registration fees. Table B. shows revenue received as the result of profit on the Commonwealth coinage of silver and bronze. It also shows the profits resulting from the Commonwealth note issue based on the assumption that Commonwealth notes issued and in circulation in excess of the gold reserve at the back of the issue is equivalent to money lent by the public to the Commonwealth without interest.

## A.

## COMMONWEALTH REVENUE FROM TAXATION.

SUBJECT.	1901-1902.	1914-1915.	1916-1917.	(Preliminary Statement) 1917-1918.
	£	£	£	£
Customs and Excise Duties .. ..	8,894,319	14,877,254	15,610,287	13,221,800
Land Tax .. ..	—	1,953,696	2,121,952	2,124,267
Income Tax .. ..	—	—	5,621,950	7,397,381
Estate Probate Duty Tax .. ..	—	39,646	1,062,168	940,460
Entertainment Tax .. ..	—	—	110,683	245,258
War Time Profits Tax .. ..	—	—	—	679,740
<b>Total .. ..</b>	<b>8,894,319</b>	<b>16,870,596</b>	<b>24,527,040</b>	<b>24,608,906</b>

## B.

## COMMONWEALTH REVENUE FROM SERVICES, FEES.

	1901-1902.	1914-1915.	1916-1917.	1917-1918.
	£	£	£	£
Post, Telegraphs, Telephones ..	2,372,861	4,594,542	5,498,517	5,766,637
Copyright Designs, Patents, Fees ..	—	21,906	20,599	20,283
Coinage Profits ..	—	208,348	354,276	229,378
(a) Note Income, Profits; Interest on uncovered notes .. ..	—	774,373	1,215,996	*1,250,000
(b) Other receipts as under .. ..	—	—	—	3,483,873
<b>Total .. ..</b>	<b>2,372,861</b>	<b>5,599,169</b>	<b>7,089,388</b>	<b>10,750,171</b>

(a) The amounts given represent the interest earnings of the Australian Notes Account and do not appear in the Consolidated Revenue.

(b) Profits on Commonwealth steamers, detained enemy vessels; receipts from quarantine, lighthouses, Federal Capital, Northern Territory and Commonwealth Railways.

\* Estimated.

**Total Commonwealth Revenue from Taxation, Services and Fees.**

Year.		Consolidated Revenue.
1901-2	=	£11,267,180
1914-15	=	£22,469,765
1916-17	=	£31,616,428
1917-18	=	£35,359,077

**Commonwealth Annual Expenditure.**

COMMONWEALTH ANNUAL EXPENDITURE.	1914-1915.	1916-1917.	1917-1918.
Ordinary expenditure new and transferred out of revenue, excluding War services ..	£16,640,153	£19,816,141	£16,229,945
Total expenditure out of revenue, including War ex- penditure .. ..	£23,644,145	£34,885,007	£34,426,554

**The Estimated Cost of Federation.**

In the Federal Convention debates official estimates and speeches delivered during the Federal campaign 1898, it was generally stated and agreed that the new Federal expenditure consequent on the establishment of a Commonwealth Government and Federal institutions departments and services would be about £300,000 ; that the expenditure in connection with old Colonial services and departments taken over from the States would be about £1,250,000, and that thus the annual cost of Federation including the new and the old services would be about £1,550,000. (The Hon. EDMUND BARTON's speech at Town Hall, Sydney ; the Hon. P. M. GLYNN's paper on *Federal Expenditure* 1898).

The States surrendered to the Commonwealth all the revenue derivable from customs and excise duties. The annual value of duties from these sources under the State tariffs was estimated at from £7,500,000 to £8,000,000. The Commonwealth would not, of course, require all that immense revenue to pay its way and it was part of the scheme of union that the Commonwealth should be entitled to apply only one-fourth of the net revenue from customs and excise for Federal purposes, and after debiting expenditure of



the transferred services should pay over the surplus revenue to the States, month by month, during the period of ten years. Let us see how this scheme worked out in actual practice.

In the first year of Commonwealth history under the new tariff, from 30th June, 1901 to 30th June, 1902, the Treasurer's balance-sheet of revenue and expenditure was as follows :—

INCOME.		EXPENDITURE.	
	£		£
Balance brought forward from 30th June, 1901	5,974	New services of the Commonwealth .. ..	275,862
Customs and Excise ..	8,692,750	Customs and Excise collection .. ..	260,322
Post and Telegraph ..	2,372,861	Post and Telegraph ..	2,461,916
Customs collected on behalf of Western Australia .. ..	201,569	Military and Naval ..	934,646
Other revenue .. ..	29,805	Returned to States ..	7,368,137
		Balance carried forward to 1902-3 .. ..	2,076
Total .. ..	£11,302,959	Total .. ..	£11,302,959

The following statement indicates the transactions of the Federal Treasurer for the year ended 30th June, 1903 :—

INCOME.		EXPENDITURE.	
	£		£
Balance brought forward from 30th June, 1902	2,076	New services of the Commonwealth .. ..	316,217
Customs and Excise ..	9,451,636	Customs and Excise collection .. ..	272,286
Post and Telegraph ..	2,404,650	Post and Telegraph ..	2,563,789
Customs collected on behalf of Western Australia .. ..	233,467	Military and Naval ..	745,183
Other revenue .. ..	16,075	Other expenditure ..	4,284
		Returned to States ..	8,200,457
		Balance carried forward to the following year ..	5,738
Total .. ..	£12,107,954	Total .. ..	£12,107,954

From the foregoing balance-sheets it will be seen that at any rate during the first two years the cost of the new system of Government was well within the estimates of the Federalists.

#### NEW COMMONWEALTH SERVICE AND EXPENDITURE.

1901-2 .. ..	£275,862
1902-3 .. ..	316,217

#### BALANCE RETURNED TO THE STATES.

1901-2 .. ..	£7,368,137
1902-3 .. ..	8,200,457

**Costs and Expenses arising from Federation.**

The following is a statement of new expenditure for the year 1917-18 arising out of Federation and not from functions or services transferred from the States to the Commonwealth. They are compiled from the budget papers of September, 1918 :—

<b>Governor-General—</b>			
Establishment .. .. .	£26,875	£26,875	
<b>Parliament—</b>			
Salaries, Ministers and members, expenses ..	237,449	237,449	
<b>Prime Minister's Department—</b>			
Including ordinary expenses, Audit Office, works, repairs, rents, pensions, High Commissioner—London, Auditor-General, Public Service Commissioner and inspectors, interest on inscribed stock and treasury bills, sinking fund .. .. .	232,580		
New works, buildings, sites, London Offices	69,982		
			302,562
<b>Department of the Treasury—</b>			
Ordinary expenses, Land Tax Commissioner, works, repairs, rent, pensions, interest on inscribed stock and treasury bills, sinking fund .. .. .	485,365		
Invalid and old-age pensions .. .. .	3,858,990		
Maternity allowance .. .. .	634,428		
New works, buildings, plant .. .. .	2,377		
			4,981,160
<b>Attorney-General's Department—</b>			
Including ordinary expenses, High Court, Industrial Registrar, works, repairs, rent ..	96,879		
			96,879
<b>Home and Territories Department—</b>			
Ordinary expenses, rent, repairs, surveys, Federal Capital, interest on inscribed stock and treasury bills, sinking fund, pensions ..	203,900		
New works, buildings .. .. .	4,579		
Federal Capital and Territory paid from Loan Fund .. .. .	95,384		
			303,863
<b>Department of Works and Railways—</b>			
Ordinary expenses, interest, rent, sinking fund, Railway Commissioner, pensions, allowances and compensations .. .. .	499,780		
Kalgoorlie-Port Augusta Railways, plant, stores paid from Loan Fund .. .. .	614,061		
New works, buildings, sites all departments	3,275		
			1,117,116
<b>Department of Trade and Customs—</b>			
Commonwealth Institute of Science and Industry .. .. .	6,961		
Salaries of Inter-state Commissioners ..	6,500		
			13,461
<b>Grand Total of New Federal Expenditure for the year 1917-1918 .. .. .</b>			
			£7,079,365

It will be seen that the foregoing statement does not include any of the ordinary expenditure in connection with the Postmaster-General's Department, the Department of Defence and the Department of Trade and Customs, which were transferred from the States to the Commonwealth. It includes provision for certain works, buildings, and sites, which expenditure has since 1904 been treated as Federal expenditure. It also includes the expenses in connection with the invalid and old-age pensions. Under the State system of old-age pensions in the year 1903, New South Wales paid £547,019 and Victoria paid £215,754, Total £762,773.

### **Extraordinary Capital Expenditure.**

The following is a summary compiled from the budget papers of September 1918, showing the capital expenditure partly out of revenue and partly out of loan money on certain public works and institutions since the establishment of the Commonwealth, interest on money expended not being included :—

Seat of Government, Canberra .. ..	=	£1,742,632
Kalgoorlie—Port Augusta Railway .. ..	=	£7,198,778
Commonwealth Offices, London .. ..	=	£833,263
Fleet Unit .. ..	=	£6,086,068
Naval Bases—		
Henderson Naval Base .. ..	=	£720,970
Flinders Naval Base .. ..	=	£661,519
Port Stevens Naval Base .. ..	=	£66,236
Albany Naval Base .. ..	=	£4,079
Floating Plant .. ..	=	£490,722
Cockatoo Island Dock Yard .. ..	=	£126,353
Pine Creek—Katherine River Railway .. ..	=	£455,336
Commonwealth Line of Government Steamers	=	2,080,656
	Total	<u>£20,466,612</u>

### **Commonwealth Borrowings.**

A separate account is kept in the Treasury of all moneys raised by way of loan upon the credit of the Commonwealth. Such account is called the Loan Fund ; Audit Act 1901-6, section 55.

The Commonwealth did not directly borrow money from the public of Australia or from the Imperial Treasury until the commencement of the war in August 1914, but it borrowed and used public trust funds.

The Naval Loan Act 1909 authorized the raising of a loan of £3,500,000 for the purpose of the naval defence of the Commonwealth ; the money to be raised by the creation and issue of inscribed stock bearing interest not exceeding 5 per cent. with provision for a sinking fund. This Act was repealed in 1910.

Up to the year 1911 the Commonwealth Government had met its public works expenditure out of revenue. In that year, however, the Commonwealth being faced with the heavy prospective cost of the Transcontinental Railway, the Federal Capital and Northern Territory, it was decided to initiate a Loan Fund similar to those of the States. The flotation of this fund was greatly assisted by the fact that the Treasury at this time held a large quantity of gold principally on behalf of the Australian Notes Account, at that time only just started.

In 1911 the Commonwealth Inscribed Stock Act was passed providing the machinery and procedure necessary, and various loan Acts were passed authorizing the raising and application of loans for Federal purposes.

The Commonwealth in taking over the Northern Territory from South Australia relieved that State of very heavy financial responsibilities. It assumed liability for the whole of the accumulated debt contracted by South Australia in its efforts to govern and develop the Territory. The Commonwealth also took over the debt on the Port Augusta—Oodnadatta railway. The debt on account of the Territory at 30th June, 1911, was £3,657,836 and on the railway £2,274,486. Total £5,932,322. As the securities fall in they are redeemed by the Commonwealth Government, the money required being taken from the Loan Fund. This debt is, therefore, a constantly diminishing one.

Commonwealth pre-war borrowed money has been applied to the following among other Federal purposes.

Railway Construction Kalgoorlie to Port Augusta ; Darwin to Pine Creek.

Loan Redemption—Port Augusta Railway, Northern Territory, Papua Railways and wharves.

Post and telegraphs and telephones, purchase of land and construction of conduits.

London office, acquisition of land and buildings.

Federal Capital acquisition of land and buildings.

Defence dockyards Cockatoo Island.

**Public Debt of the Commonwealth.**

On 30th June, 1918, the public debt of the Commonwealth was as follows :—

**Pre-War and Note Issue Borrowings.****PRE-WAR AND NOTE ISSUE BORROWINGS.**

	£	s.	d.
Commonwealth Government inscribed stock purchased by the Treasurer out of trust funds .. .. .	4,580,000	0	0
Commonwealth Treasury Bills .. .. .	6,241,031	0	0
Balance of Northern Territory loans taken over from South Australia .. .. .	2,772,515	0	0
Balance of Port Augusta—Oodnadatta Railway loans taken over from South Australia ..	1,759,003	0	0
Value of properties transferred from the States to the Commonwealth .. .. .	11,202,515	0	0
Commonwealth notes uncovered by gold reserve	35,427,505	0	0
<b>Total ..</b>	<b>£61,982,569</b>	<b>0</b>	<b>0</b>

**WAR LOANS.**

Since the War the Commonwealth borrowings up to 30th June, 1918, have been as follows :—

		£	s.	d.
<b>(a) From the Imperial Government.</b>				
War Loan Act 1914 .. .. .		18,000,000	0	0
War Loan Act No. 2, 1915 .. .. .		6,500,000	0	0
War Loan Act No. 2, 1916 .. .. .		25,000,000	0	0
On behalf of States .. .. .		12,000,000	0	0
<b>(b) From the Australian public.</b>				
1st loan, 1915 .. .. .		13,389,440	0	0
2nd „ 1916 .. .. .		21,655,680	0	0
3rd „ 1916 .. .. .		23,587,420	0	0
4th „ 1917 .. .. .		21,421,070	0	0
5th „ 1917 .. .. .		20,281,160	0	0
6th „ 1918 .. .. .		43,510,740	0	0
War Savings Certificates .. .. .		4,535,360	0	0
<b>Total ..</b>		<b>£209,880,870</b>	<b>0</b>	<b>0</b>

## OTHER OBLIGATIONS.

		£	s.	d.
Accrued Deferred Pay Australian Imperial				
Force to 30th June, 1918	.. ..	10,309,908	0	0
Indebtedness to Government of the United				
Kingdom, for maintenance, transport, and				
equipment of A.I.F. to 30th June, 1918	.. ..	38,345,000	0	0
Total		£48,654,908	0	0
PRE-WAR AND NOTE ISSUE BORROWINGS	.. ..	£61,982,569	0	0
WAR LOANS	.. ..	209,880,870	0	0
OTHER OBLIGATIONS	.. ..	48,654,908	0	0
*7TH WAR LOAN	.. ..	42,000,000	0	0
Grand Total		£362,518,347	0	0

\* Floated since complement of returns.

## CHAPTER III.

# JUDICIAL INTERPRETATION OF THE CONSTITUTION.

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### PART I.

#### RUBRICS OF CONSTITUTIONAL CASES.

##### (1) COMMONWEALTH POWERS AND IMMUNITIES.

###### **Classification of Leading Cases.**

The leading cases involving interpretation of the Constitution which have been decided by the High Court may for purposes of study and comparison be classified under the following main headings.

In the first important group of Constitutional cases which came before the High Court the doctrine of the immunity of Commonwealth Government agencies and instrumentalities, from impairment or interference by the operation of State taxation and other laws, was affirmed. The same doctrine was subsequently applied to recognize the immunity of State Government agencies and instrumentalities from impairment or interference by the operation of Federal laws. In several cases the principle was recognized that the Crown is represented in the States by the State Governors, and in the Commonwealth by the Governor-General. The rule of construction was laid down that the Crown, in its capacity as a Federal Government, is not to be deemed to be intended to be bound by State laws, unless the Crown in that capacity is expressly named in such State laws, and unless such State laws are authorized by the Constitution of the Commonwealth.

**Commonwealth Agencies and Instrumentalities.**

*D'Emden v. Pedder*, (1904) 1 C.L.R., 91.—State revenue duty stamps are not necessary on receipts given by Commonwealth officers for their official salaries; State laws requiring such duty stamps are invalid. The State taxation of Commonwealth instrumentalities is, by necessary implication, forbidden by the Constitution. So held by the High Court.

*Deakin v. Webb*, (1904) 1 V.L.R., 585.—A State cannot impose or enforce the collection of income tax on the salaries of Federal officers earned in the course of their official duties. The principle of *D'Emden v. Pedder* (*supra*) re-affirmed. *Wollaston's Case*, 28 V.L.R., 367, over-ruled. See, however, *Webb v. Outtrim*, (1907) App. Cas., 81, in which the Privy Council refused to follow the ruling of the High Court.

*Baxter v. Commissioner of Taxation of N.S.W.*, (1907) 4 C.L.R., 1087.—In an action brought in the District Court of New South Wales by the State Commissioner of Taxation against a Federal officer Baxter to recover State income tax assessed on his Federal salary, the Judge following the decision of the Privy Council in *Webb v. Outtrim*, (1907) App. Cas., 81, gave a verdict for the plaintiff. Defendant appealed to the High Court which, following its own decision in *Deakin v. Webb*, 1 C.L.R., 81, held that in the matter as to the limits *inter se* of the Constitutional powers of the Commonwealth and those of the State, it was not bound to submit itself to the guidance of the Privy Council, except in cases where it had granted a certificate permitting the appeal to the Privy Council from its own decisions. The appeal from the District Court was therefore allowed and judgment was entered for the defendant. An application for a certificate under section 74 of the Constitution permitting appeal to the Privy Council was refused.

*Flint v. Webb*, (1907) 4 C.L.R., 1178.—This was an appeal from the Court of Petty Sessions in Victoria in which a verdict had been given against a Federal officer requiring him to pay income tax on his Federal salary to the State of Victoria. For reasons given in *Baxter v. Commissioner of Taxation of N.S.W.*, the appeal was allowed and the High Court refused to grant a certificate permitting the appeal to the Privy Council.



*Chaplin v. Commissioner of Taxes of South Australia*, (1911) 12 C.L.R., 375.—The Commonwealth Parliament may pass a law making the salaries and allowances of Federal officers, members, and ministers liable to State income taxation. The Commonwealth Salaries Act 1907 is an effective grant to the States of authority to tax such salaries and allowances.

*Municipal Corporation of Sydney v. The Commonwealth*, (1904) 1 C.L.R., 208.—A Municipal Rate Assessment Act must be construed as not applying to land the property of the Commonwealth, which, by section 114 of the Constitution, is not liable to pay rates.

*Roberts v. Ahern*, (1904) 1 C.L.R., 406.—The provision of a State Police Offences Act prohibiting persons from removing offensive matter without a licence will be construed as not intended to be binding on contractors or workers of the Federal Government.

*The Commonwealth v. The State of New South Wales*, (1906) 3 C.L.R., 807. A memorandum of transfer of real estate from a private individual to the Commonwealth is free from State taxation and is therefore entitled to be marked by the State Commissioner of stamp duty as exempt from duty imposed by the Stamp Duties Act; such a transfer is a necessary Federal instrumentality within the rule of *D'Emden v. Pedder* (*supra*).

### **Surplus Revenue.**

*The State of New South Wales v. The Commonwealth*, (1908) 7 C.L.R., 179.—The Surplus Revenue Act (1908) providing for the appropriation of unspent "Federal fourth" of revenue at the end of each year and providing that such unspent surplus should not be paid to the States, held to be valid.

### **The Trade and Commerce.**

*The King v. Sutton*, (1908) 5 C.L.R., 789.—The Customs law of the Commonwealth relating to the control, examination and entry of goods imported into the Commonwealth are as binding on State Governments and State officers as on private individuals.

*Attorney-General of New South Wales v. Collector of Customs*, (1908) 5 C.L.R., 818.—A State is bound to pay Customs duties on goods imported by it, even for State use. The levying of duties of Customs on State imports is not the imposition of a tax upon State property within the meaning of section 114 of the Constitution.

*Appleton v. Moorhead*, (1909) 8 C.L.R., 330.—Section 15B of the Australian Industries Preservation Act 1906, authorizing the Comptroller-General of Customs to require any person to answer questions and produce documents, relating to inter-state and external trade, is a valid exercise of the commerce power.

*Baxter v. Ah Way*, (1909) 8 C.L.R., 626.—The Customs Act (1901) section 52, sub-section (g) enabling the Governor-General in Council to prohibit by Proclamation the importation of goods, such as opium, into the Commonwealth is a valid exercise of Federal power within section 51 (i.) and 51 (ii.) of the Constitution relating to commerce and taxation.

### State Imports.

*The King v. Sutton*, (1907) 5 C.L.R., 789, and *The Attorney-General of New South Wales v. The Collector of Customs of New South Wales*, (1908) 5 C.L.R., 818. The Commonwealth cannot tax State property (Constitution, section 114), but goods imported by a State Government for State purposes are not property within the protection of section 114. This is apparently an exception to the rule of immunity, and it is based upon the exclusive power of the Commonwealth to control external and inter-state trade and commerce. State imports, such as wire-netting and railway materials, are on arrival from abroad into the Australian ports under the control of the Commonwealth Customs Department, and are subject to Customs laws, and cannot be removed from bond except with the authority of the Customs Department and after payment of Customs duties authorized by law.

### Corporations.

*Huddart Parker & Co. Ltd. v. Moorhead*, (1909) 8 C.L.R., 330. —A Federal law may impose conditions subject to which foreign companies and trading and financial companies, already incorporated by foreign or State laws, may engage in trade and commerce within a State, and a Federal law may even prohibit such companies from engaging in such internal State trade and commerce, but the Federal Parliament cannot pass laws for the creation or dissolution of such corporations.

### Inter-State Trade, Travel and Intercourse.

The police powers of the States have been to some extent cut down by the absolute mandate of section 92 of the Constitution :—

“Trade, commerce and intercourse among the States shall be absolutely free.” Therefore a State cannot pass laws limiting the right of travel into or transit through and across its boundaries. The Commonwealth cannot pass laws interfering with the business done by or contracts made by private persons or corporations engaged in trade, commerce, shipping or industry confined to the limits of a State.

*Attorney-General for New South Wales v. Brewers' Employees Union of New South Wales*, (1908) 6 C.L.R., 546.—The power to make laws in respect to trade and commerce with other countries and among the States involves the right of legislating in respect of trade marks used in trade and commerce; but Parliament can only exercise that power validly in an enactment which apparently confines its operations within those limits.

*Fox v. Robins*, (1908) 8 C.L.R., 115.—The law of the State of Western Australia which, for a licence authorizing the sale of wine manufactured from fruit grown in any other State, requires a greater fee to be paid than for a licence authorizing the sale of wine manufactured from fruit grown in the first-mentioned State, is contrary to the provisions of section 92 of the Constitution, and is, therefore, to the extent at least of the difference between the fees so required to be paid, invalid.

*Huddart Parker & Co. Ltd. v. Moorhead*, (1909) 8 C.L.R., 330.—Section 5 (1) (a) and 8 (1) of the Australian Industries Preservation Act 1906 generally forbidding corporations from entering into certain contracts is not within the Federal control over corporations granted by section 51 (xx.) of the Constitution; but sections 4 and 7 of the same Act, which are limited, in terms, to contracts in relation to trade or commerce with other countries or among the States, are valid, being within the commerce power granted by section 51 (i.) of the Constitution.

*Adelaide Steamship Co. Ltd. v. Attorney-General of the Commonwealth*, (1912) 15 C.L.R., 65. The provisions of the Australian Industries Preservation Act 1906, section 4 (1) (a) and section 7, relating to trusts, combines and monopolies in restraint of interstate trade and trade with other countries are valid; but, in order to establish an offence or cause of action, there must be proved,

not only an injurious restraint, but also an intent to cause detriment to the public. This decision of the High Court was confirmed by the Privy Council on appeal : (1913) 18 C.L.R., 30.

*The King v. Smithers ; Ex parte Benson*, (1912) 16 C.L.R., 109.—The former powers of the States to exclude persons whom they might think to be undesirable inhabitants, and even convicted criminals, have been to some extent cut down by the mere fact of Federation, entirely irrespective of section 92 of the Constitution. The Influx of Criminals Prevention Act (1903) of New South Wales making it an offence for prohibited immigrants or convicted persons in certain circumstances to enter New South Wales is void.

### Inter-State Free Trade.

*The State of New South Wales v. The Commonwealth*, (1915) 20 C.L.R., p. 55.—The Wheat Acquisition Act (1914), New South Wales, authorizing the State Government to take possession of and acquire the absolute property in all wheat in the State is a valid exercise of State power and is not contrary to section 92 of the Constitution.

*Foggitt Jones & Co. v. The State of New South Wales*, (1916) 21 C.L.R., 257.—The Meat Supply for Imperial Uses Act 1915, New South Wales, purporting to authorize the State Government to prevent the owners of stock from exporting the same is invalid, being contrary to section 92 of the Constitution. Over-ruled in *Duncan v. The State of Queensland (infra)*.

*Duncan v. The State of Queensland*, (1916) 22 C.L.R., 557.—The mandate of section 92 that trade, commerce and intercourse among the States shall be absolutely free is not violated by a State law relating to personal property which provided that such property may be held for the purposes of and subject to the disposal of His Majesty's Imperial Government, that such property shall not be sold or disposed of, forwarded, consigned, shipped, exported, delivered or in any manner dealt with, except in pursuance and under the directions and orders of the Chief Secretary of the State.

### Appeals to the Privy Council.

*Webb v. Outtrim*, (1906) 4 C.L.R., 356 ; (1907) A.C., 81.—The Commonwealth Parliament has no power to take away the right of litigants in any Australian Supreme Court to apply for leave to

appeal to the Privy Council given by the Imperial Order in Council of 6th June 1860, sub-section (a) of section 39 (2) of the Judiciary Act (1903) so far as it abolishes the right of appeal to the Privy Council is invalid ; but as to constitutional cases see now Judiciary Act (1903-10) section 40 (1).

*Baxter v. Commissioner of Taxation of New South Wales*, (1907) 4 C.L.R., 108.—Even if section 39, sub-section 2 (a) of the Judiciary Act (1903) which purports to take away the prerogative right of appeal to the King in Council is, to that extent, *ultra vires* and inoperative, its failure in that respect does not affect the validity of the grant of federal jurisdiction to State Courts contained in the rest of the section, and the consequent right of appeal to the High Court from a State Court exercising such jurisdiction.

### Judicial Power.

*The Commonwealth v. New South Wales (State)*, (1915) 20 C.L.R., 5.—Parliament has no authority to invest the Inter-State Commission—whose members are appointed for seven years only—with the judicial powers of a Federal Court to issue an injunction to restrain a violation of the Constitution.

*Waterside Workers' Federation v. J. W. Alexander Ltd.*, (1918) 25 C.L.R.—The imposition of penalties for breach or non-observance of an order or award made by the Commonwealth Court of Conciliation and Arbitration is a part of the judicial power of the Commonwealth, and can only be exercised by the High Court or by a State Court invested with summary jurisdiction.

### Industrial.

*Jumbunna Coal Mine Co. v. Victorian Coal Miners' Association*, (1908) 6 C.L.R., at p. 309.—The provision of the Commonwealth Conciliation and Arbitration Act (1904) authorizing the registration of associations of employers and workers as organizations, and providing for the incorporation of such organizations with capacity to own land, is valid within the Constitution section 51 (xxxv.).

*The King v. The Commonwealth Court of Conciliation and Arbitration; Ex parte The Broken Hill Proprietary Ltd.*, (1909) 8 C.L.R., 419.—Notwithstanding that section 13 of the Commonwealth Conciliation and Arbitration Act (1904) provides that “no

award of the Court shall be challenged, appealed against, reviewed, quashed or called in question," if the Court makes an industrial award not authorized by the Constitution, sub-sections xxxv. and xxxix., the High Court in its original jurisdiction, as distinguished from its appellate jurisdiction, can, by virtue of the power conferred on it by section 75 (v.) of the Constitution issue a writ of prohibition directed to the President of the Court restraining him from enforcing such award.

*Federated Saw Mills Employees v. James Moore & Sons Ltd.*, (1909) 8 C.L.R., 465, at pp. 496 and 507.—An industrial award in an inter-state dispute under the Commonwealth Conciliation and Arbitration Act giving different rates of wages or different conditions of employment in different States, will not necessarily be a violation of section 99 of the Constitution, which forbids preference of one State over another State. The Commonwealth Court of Conciliation and Arbitration has power to make an enforceable award inconsistent with (1) an award of a State Arbitration Court or (2) an industrial agreement recognized by State law. But it has no power to make an industrial award which is inconsistent with the determination of a Wages Board empowered by a State statute to fix a minimum rate of wages.

*The King v. The Commonwealth Court of Conciliation and Arbitration; Ex parte The Broken Hill Proprietary Co. Ltd.*, (1909) 8 C.L.R., 419.—When employees engaged in different branches of one industry carried on in different States by a single employer take concerted action in making a common demand of their employer for certain conditions of employment, and the employer, understanding that the demand is so made on behalf of all the employees, refuses to accede to it there arises an industrial dispute extending beyond the limits of one State. The mere cessation of work in an industry owing to the existence of an unsettled industrial dispute, does not in itself amount to a termination of the relationship of employer and employee within the meaning of the Act. That depends upon whether the conduct of the parties evinced an intention that the relationship should come to an end.

*Australian Boot Employees Federation v. Whybrow & Co.* (No. 1), (1910) 10 C.L.R., 266.—An industrial award under the Commonwealth Conciliation and Arbitration Act disregarding the rights and duties of disputants, arising under existing contracts or

under the award of State Industrial Courts (not Wages Boards), is valid. An award of the Commonwealth Court of Conciliation and Arbitration is not necessarily void on the ground of inconsistency with State law (1) if it fixes a minimum rate of wages higher than that fixed by the determination of a State Wages Board or (2) if it makes provision for payment of wages to apprentices aged, slow, or infirm workers, lower than the minimum contained in the award of a State Wages Board.

*Australian Boot Trade Employees' Federation v. Whybrow & Co.*, (1910) 11 C.L.R., 311.—The provisions of section 38 (f) of the Commonwealth Conciliation and Arbitration Act 1904-10 purporting to authorize the Court to make an award a common rule applicable to any industry, is invalid. The grounds of the invalidity of the common rule, section 38 (f) of the Conciliation and Arbitration Act (1904) were that it conferred on the arbitrator legislative authority, properly so called, or at least, it authorized the arbitrator to make an award binding on persons not parties to the dispute before him, such being not an act of a judicial nature but a legislative act.

*The King v. The Commonwealth Court of Conciliation and Arbitration; Ex parte Whybrow & Co.*, (1910) 11 C.L.R., 1.—The High Court has jurisdiction under section 75 (x.) of the Constitution to grant prohibition to the President of the Commonwealth Court of Conciliation and Arbitration if he assumes to exercise power beyond the competency of the Parliament to confer. The Commonwealth Conciliation and Arbitration Act (1904) as a compulsory scheme of arbitration to settle disputes between parties, is as a whole a valid exercise of the power conferred by the Constitution, section 51 (xxxv.). It is not invalid as a whole, even if section 38 (f) authorizing the Court to make an award a common rule is invalid, as that section is severable from the rest of the Act. It was held later, (1910) 11 C.L.R., 311, that section 38 (f) is *ultra vires* and void.

*The King v. The Commonwealth Court of Conciliation and Arbitration and the Merchant Service Guild of Australasia; Ex parte Allen Taylor & Co. Ltd., William Holyman and another*, (1913) 15 C.L.R., 586.—The term "industrial dispute" connotes a real and substantial difference having some element of persistency (more than a formal claim) and likely if not adjusted to endanger the industrial peace of the community. Such a dispute is not created by a mere formal demand and formal refusal.

*The Merchant Service Guild of Australasia v. Newcastle and Hunter's River Steamship Co. Ltd.*, (No. 1), (1913) 16 C.L.R., 592.—Section 4 (III.) of the Commonwealth Conciliation and Arbitration Act 1904-11 giving the Court jurisdiction to arbitrate as well as conciliate, where there is an industrial dispute "threatening, impending or probable" is not unconstitutional.

*The Merchant Service Guild of Australasia v. Newcastle and Hunter's River Steamship Co. Ltd.* (No. 2), (1913) 16 C.L.R., 705.—The High Court will not answer a question submitted by the President of the Commonwealth Court of Conciliation and Arbitration as to what are the necessary *indicia* of an industrial dispute. It will deal with each case, and each special state of facts, as it arises without giving a general definition.

*Australian Agricultural Co. v. Federated Engine Drivers' and Firemen's Association of Australia*, (1913) 17 C.L.R., 261.—The High Court of Australia can over-rule a prior decision of the Court when it is manifestly wrong. Hence over-ruling the case of *J. C. Williamson & Co. v. Musicians' Union of Australia*, 15 C.L.R., 636, a majority of the Court held that an agreement between an organization of employees and an employer, made at a time when there is an industrial dispute extending beyond the limits of one State and purporting to bind the parties or either of them from instituting proceedings in the Commonwealth Court of Conciliation and Arbitration, is contrary to policy and void.

*Australian Tramway Employees' Union v. Brisbane Tramway Co. and the Adelaide Tram Trust*, (1913) 17 C.L.R., 680.—The Commonwealth Court of Conciliation and Arbitration may in, interstate industrial disputes, authorize the wearing of the union badge. The question of wearing visibly, whilst on duty, a distinctive badge, may involve an industrial dispute within the jurisdiction of the Court.

*The King v. The Commonwealth Court of Conciliation and Arbitration and the Australian Tramway Employees' Association; Ex parte Brisbane and Adelaide Tramways Trust* (No. 1), (1913) 18 C.L.R., 54; *Prohibition Case* (No. 1).—Section 31 of the Commonwealth Conciliation and Arbitration Act 1904-11 so far as it purports to take away from the High Court the power to issue a



writ of prohibition restraining the enforcement of an industrial award of the Arbitration Court, made in excess of jurisdiction, is invalid.

*The King v. The Commonwealth Court of Conciliation and Arbitration; Ex parte Jones, Cooper and others*, (1914) 18 C.L.R., 225.—The building trade, notwithstanding its diversities and the absence of inter-state competition is an industry in respect of which there may be an industrial dispute extending beyond the limits of any one State within section 51 (xxxv.) of the Constitution. It was so held by majority of the High Court, ISAACS, GAVAN DUFFY, POWERS and RICH, JJ. (GRIFFITH, C.J. and BARTON, J., dissenting). Prohibition was therefore refused except as to paragraphs 18 and 19 of the award providing for compensation to workmen injured in the course of their employment, and for the appointment of a Board of Reference to perform certain delegated functions. The parts of the award relating to wages, hours, and other conditions of labour were undisturbed. The employers applied to the Privy Council for leave to appeal but it was refused, (1917) A.C. 528.

In the *Builders' Labourers' Case*, (1914) 18 C.L.R., 224, held a dispute extends beyond the limits of any one State when it exists in more than one State, that is to say, extends over an area which embraces territory of more than one State. When persons engaged in industrial disputes, and living some in one State and some in another, join together to insist, and do insist, on the concession of common industrial conditions which are definitely and finally refused by those from whom they are demanded, the words of the subsection are satisfied.

*The King v. The Commonwealth Court of Conciliation and Arbitration and the Australian Tramway Employees' Association; Ex parte Brisbane and Adelaide Tramways Trust (No. 2)*, (1914) 19 C.L.R., 43.—A demand in the form of a log setting forth the conditions of employment had been made upon the employers and had not been acceded to. The High Court found that the demand did not represent the real grievances of any body of employees but was put forward by the organization merely as a means of invoking the jurisdiction of the Commonwealth Court of Conciliation and Arbitration and obtaining from it an award on the most favourable terms possible; and, therefore, that the President had no jurisdiction to make the award.

*Federated Engine Drivers' and Firemen's Association v. Colonial Sugar Refining Co. Ltd.*, (1916) 22 C.L.R., 103.—The Conciliation and Arbitration Act 1904-15, section 21AA, enabling a Justice of the High Court to decide in a preliminary way whether, in a given case there is an industrial dispute within the Constitution "existing threatened, impending or probable" and making his decision final and conclusive and not open to question in any Court on any account whatever is a valid exercise of Federal legislative authority.

*Waterside Workers' Federation v. J. W. Alexander Ltd.*, (1918) 25 C.L.R.—Section 44 of the Commonwealth Conciliation and Arbitration Act 1904-15, so far as it purports to give to the Conciliation and Arbitration Court, power to impose penalties for breach or non-observance of any term of an order or award is invalid. Such orders or awards can only be enforced by the High Court or by a State Court invested with summary jurisdiction.

### **Extra-territorial.**

*Kingston v. Gadd*, (1902) 27 V.L.R., 417; *Kingston v. P. & O. Co.*, (1903) App. Cas., 471.—The Commonwealth Customs Act, section 192, in effect forbidding the consumption of dutiable goods on the high seas between Australian ports without payment of Customs duties thereon and prohibiting ships from entering any Australian port with the Australian Customs' seals broken is valid. So affirmed by the Full Court of Victoria and the Privy Council.

*Robtelmes v. Brennan*, (1906) 4 C.L.R., 395.—The Pacific Islands Labourers Act 1901, section 8, which authorizes the deportation of certain coloured persons from Australia and their incidental restraint and imprisonment on board ship during deportation is a valid exercise of the Federal power.

*Merchant Service Guild of Australasia v. Archibald Currie & Co.*, (1908) 5 C.L.R., 737.—A plaint to recover an award for better employment conditions was filed in the Commonwealth Court of Conciliation and Arbitration by an organization of ship's officers against a joint stock company registered in Victoria owning lines of ships trading between Calcutta and Australia. The ship's articles were signed in Calcutta, services were rendered between Australia and Calcutta and Calcutta and Australia. The officers lived in Australia; they were at times engaged in Australia, and they were allowed, although not entitled to be, discharged in Australian ports. It was held by the High Court, in a case stated, that the Arbitration

Court had no jurisdiction to settle disputes as to wages and conditions of service in such a case, and that the ships did not come within clause V. of the Constitution.

*Merchants Service Guild of Australasia v. The Commonwealth Steamship Association*, (1913) 16 C.L.R., 665.—By virtue of covering clause V. of the Constitution, a single and indivisible industrial dispute may be none the less an industrial dispute extending beyond the limits of any one State, merely because some of the operations of the dispute should take place beyond the territorial limits of the Commonwealth. A power to prevent and settle disputes with respect to labour to be performed outside the territorial limits necessarily implies a power to prescribe terms and conditions with respect to such labour. The question as to whether an award can impose penalties for breach thereof outside the territorial limits has not been answered by the High Court.

*Australian Steamship Ltd. v. Malcolm*, (1914) 19 C.L.R., 298.—The ambit of the legislative authority of the Federal Parliament in exercising its valid powers, is restricted to the territorial limits of the Commonwealth, but by virtue of clause V. of the Constitution an extra-territorial effect is given to such laws on board British ships sailing on the high seas from one port of the Commonwealth to another port of the Commonwealth. Hence a seaman injured whilst engaged on an inter-state voyage could claim compensation under the Commonwealth Seamen's Compensation Act 1911.

### Inter-State Shipping and Navigation.

*Kalibia, S.S. Owners v. Wilson*, (1910) 11 C.L.R., 689.—The Seamen's Compensation Act (1909) which expressly dealt with all the existing trade and commerce shipping and navigation of Australia whether within the limits of a State or extending from one State to another was held to be beyond the Constitutional powers of the Federal Parliament and therefore null and void.

*The Australian Steamship Co. Ltd. v. Malcolm*, (1915) 19 C.L.R., 298.—The Seamen's Compensation Act (1911) relating to compensation for accidents sustained by seamen engaged in navigation and shipping pursuits within the limits of inter-state and external trade and commerce is valid.

**Trade Marks.**

*Attorney-General of New South Wales v. The Brewery Employees' Union of New South Wales*, (1908) 6 C.L.R., 469.—The Commonwealth Trade Marks Act, Part VII., authorizing the registration of and giving proprietary rights in a "workers' label" is in substance an attempt to regulate the internal trade of the States, not within or incidental to any of the expressed powers conferred on the Parliament to regulate that trade and is therefore *ultra vires*.

**Commonwealth Royal Commissions.**

*Colonial Sugar Refining Co. Ltd. v. Attorney-General for the Commonwealth* High Court, (1912) 15 C.L.R., 184.—The Executive Government of the Commonwealth cannot authorize a Royal Commission to take evidence on oath on matters and subjects outside the legislative powers of the Commonwealth or respecting matters relevant only to a possible amendment of the Constitution. Such inquiries are exclusively within the competence of the States. So held by a majority of the High Court. The Federal Parliament can pass a law compelling persons to give evidence on oath respecting matters and subjects within the ambit of the legislative powers of the Commonwealth; such a law being within the incidental power conferred by section 51 (xxxix.) of the Constitution. The Commonwealth Royal Commissions Act 1902-12 is valid. So held by a majority of the High Court.

*Attorney-General for the Commonwealth v. Colonial Sugar Refining Co.*, Privy Council, (1914) 17 C.L.R., 645.—The Commonwealth Royal Commissions Act 1902-12 in its present form is *ultra vires* of the Commonwealth Parliament and void so far as it purports to authorize a Royal Commission to compel answers to questions, or to order the productions of documents, relating to subjects generally. The decisions of the High Court, 15 C.L.R., 184, varied by the Privy Council.

**Inter-State Commission.**

*The State of New South Wales v. The Commonwealth*, (1915) 20 C.L.R., 54. Part V. of the Inter-State Commission Act 1912 constituting the Inter-State Commission a Court of Record with power to issue injunctions is invalid.

**Taxation.**

*The King v. Barger and The Commonwealth v. Barger*, (1908) 6 C.L.R., 41.—The Excise Tariff Act 1906 is invalid, *inter alia*, because it deals with matters other than duties of excise, viz. : the regulation of wages and labour conditions in the manufacture of agricultural implements, contrary to section 55 of the Constitution.

*The King v. Barger and The Commonwealth v. Barger (supra)*. —The Excise Tariff Act 1906 is also invalid because it authorized discriminations between States in wages conditions, contrary to section 51 (II.) of the Constitution, and also because it authorized the giving of preference to one State over another State contrary to section 99 of the Constitution.

*Osborne v. The Commonwealth*, (1911) 12 C.L.R., 321.—The effect of the second paragraph of section 55 of the Constitution is to render invalid an Act imposing taxation which deals with any other matters or with more than one subject of taxation. The Land Tax Act (1910) incorporated with the Land Tax Assessment Act (1910) does not offend against these provisions. The Land Tax Act 1910 read and incorporated with the Land Tax Assessment Act 1910 is an Act imposing taxation only ; it is not an Act to prevent the holding of large quantities of land and so is valid. *Morgan v. Deputy Commissioner of Land Tax* (1912) 15 C.L.R., 661.—The Land Tax Assessment Act section 39 is valid.

*Attorney-General for Queensland v. Attorney-General for The Commonwealth*, (1915) 20 C.L.R., 148.—The Land Tax Assessment Act 1910-14, so far as it purports to impose a land tax upon private individuals holding leasehold estates in Crown lands, is a valid exercise of the Federal taxing power. It is not an attempt to control the administration of the waste land of the Crown vested in the States.

**Defence Powers.**

*Krigger v. Williams*, (1912) 15 C.L.R., 366.—The Defence Act 1903-10 imposing obligations on all male inhabitants of the Commonwealth in respect of military training does not prohibit the free exercise of any religion, and, therefore, is not an infringement of section 116 of the Constitution. A person who is forbidden by the doctrines of his religion to bear arms is not thereby exempted or excused from undergoing the military training and rendering the personal service required by Part XII. of the Defence Act 1903-10.

*The King v. Hyde; Ex parte Wallach; Hyde v. Wallach*, (1915) 20 C.L.R., 294.—The regulations under the War Precautions Act 1914 authorizing the Minister of Defence to intern naturalized persons suspected of disaffection or disloyalty is a valid exercise of the defence power.

*Moss and Phillips v. Donohoe*, (1915) 20 C.L.R., 580.—The Trading with the Enemy Act 1914 making it a criminal offence to trade, or attempt to trade, with the enemy after the Imperial Proclamation of 9th September 1914 is a valid exercise of the defence power. Convictions sustained.

*Welsbach Light Co. Ltd. v. The Commonwealth*, (1916) 22 C.L.R., 268.—The Trading with the Enemy Act 1914, section (2) which provides that for the purposes of the Act a person shall be deemed to trade with the enemy if he performs or takes part in “(b) any act or transaction which is prohibited by or under any proclamation made by the Governor-General and published in the *Gazette*” is a valid exercise of the legislative power of the Commonwealth Parliament.

*Farey v. Burvett*, (1916) 21 C.L.R., 433.—The regulations under the War Precautions Act 1914 authorizing the fixing of the highest prices to be paid for bread in certain localities during the present war are a valid exercise of the defence power.

### **Criminal Law.**

*The King v. Kidman*, (1915) 20 C.L.R., 425.—The Crimes Act 1914 creating certain criminal offences within the Federal sphere; also the Crimes Act 1915 adding to it the offence of conspiracy to defraud the Commonwealth and making the Act retrospective (*ex post facto*) is within the Federal power.

### **Federal Territories.**

*Buchanan v. The Commonwealth*, (1913) 16 C.L.R., 315.—The Northern Territory Acceptance Act 1910 and the Northern Territory Administration Act 1910, so far as they purport to give effect, in the Northern Territory, as law of the Commonwealth, the laws of the State of South Australia are valid.

*The King v. Bernasconi*, (1915) 19 C.L.R., 629.—The Commonwealth Parliament has power conferred by section 122 of the Constitution to make laws for the Government of a territory, whether

that power is exercised directly or through a subordinate legislature. Such power is not restricted by the provision in section 80 of the Constitution that the trial on indictment of any offence against any law of the Commonwealth shall be by jury. Section 80 has no application to territories ; its operation is confined to States.

#### **External Affairs.**

*McKelvey v. Meagher*, (1906) 4 C.L.R., 278.—The power conferred on the Commonwealth Parliament by section 51 (xxxix.) with respect to “ external affairs ” probably includes the power to pass the necessary laws to give effect to the Imperial Fugitive Offenders Act (1881), section 32, or to deal with the surrender of fugitive offenders between the Commonwealth and other parts of the British Dominions. The Commonwealth Extradition Act (1903) extending to the Commonwealth the provisions of the Imperial Extradition Act (1870-1895) which provides for the surrender of fugitive criminals to foreign States is apparently a valid exercise of Federal power pursuant to section 51 (xxxix.) of the Constitution.

### **(2) STATE POWERS AND IMMUNITIES.**

#### **State Agencies and Instrumentalities.**

*Federated Amalgamated Government Railway and Tramway Service Association v. New South Wales Railway Traffic Employees' Association*, (1906) 4 C.L.R., 488.—The converse of the rule laid down in *D'Emden v. Pedder* (*supra*), was applied to a case of interference by the Commonwealth with State instrumentalities. The Commonwealth Conciliation and Arbitration Act (1904), section 4, purporting to give the Commonwealth Arbitration Court jurisdiction to make an industrial award, applicable to employment on State railways, was held to be *ultra vires* and void. The Federal Parliament cannot pass a valid law giving the Commonwealth Court of Conciliation and Arbitration jurisdiction to make industrial awards regulating the labour and employment conditions on State railways. Subject to the Constitution, section 51 (xxxii.), the control and management of such instrumentalities are exclusively vested in the States. The Railway Traffic Employees' Association of New South Wales consisting of Government railway employees was held by the High Court not to be entitled to be registered as an industrial organization under the Commonwealth Conciliation and Arbitration Act.

*Federated Engine Drivers' and Firemen's Association of Australia v. Broken Hill Proprietary Co. Ltd.*, (1911) 12 C.L.R., 414.

—The Board of Water Supply and Sewerage, Sydney, is, according to the laws of New South Wales, in the strictest sense, a department of the State Government and is therefore an instrumentality of State Government entitled to the same immunity from Federal interference and power as any other State department; therefore an industrial award of the Commonwealth Conciliation and Arbitration Court is not binding on such Board.

*Federated Engine Drivers' and Firemen's Association of Australia v. Broken Hill Proprietary Co. Ltd.*, (1913) 16 C.L.R., 245.—

A municipal corporation (City of Melbourne) is not an instrumentality entitled to immunity from a Federal industrial award where it engages in municipal trading, such as supplying electrical energy to the public; hence an industrial award made by the Commonwealth Court of Conciliation and Arbitration is binding on such a corporation, when acting within its trading sphere of activity.

*Federated Engine Drivers' and Firemen's Association of Australia v. Broken Hill Proprietary Co. Ltd.*, (1913) 16 C.L.R., p. 262.

—If a municipal corporation chooses to engage in what has been called “municipal trading” and joins the ranks of employers in industries, it is liable to the same Federal laws as other employers in the same industries.

### **Intra-state Trade and Commerce.**

*The King v. Barger and The Commonwealth v. McKay*, (1908) 6 C.L.R., 441.—The control of the domestic affairs of the States is exclusively vested in the States and the interference of the Commonwealth therewith by legislation either directly or indirectly is forbidden. The power of taxation by the Commonwealth Parliament cannot be exercised so as to operate as an indirect interference with those affairs in that particular. The selection of a particular class of goods produced in Australasia for taxation by a method which makes the liability to, or immunity from, taxation dependent upon conditions to be observed in the industry in which they are produced, such as “high wages no tax” is as much an attempt to regulate those conditions as if the regulations were made by distinct enactment.



*The King v. The Commonwealth Court of Conciliation and Arbitration and the Australian Tramway Employees' Association; Ex parte Brisbane and Adelaide Tramways Company (No. 2)*, (1914) 19 C.L.R., 43.—An industrial award granting preference to unionists in Queensland was declared void on the ground that it was contrary to the Queensland Industrial Peace Act 1912, passed before the award, and forbidding discrimination against any person for membership or non-membership of the union. *Per* GRIFFITH, C.J., and BARTON, J.

#### **State Discriminations.**

*Davis and Jones v. The State of Western Australia*, (1905) 2 C.L.R., 29.—A State succession or legacy law, charging certain beneficiaries under a will who are *bona fide* residents of, and domiciled in that State only one-half the percentage of duty charged to beneficiaries who are residents of and domiciled in other States, is a valid exercise of State power and is not a discrimination forbidden by section 117 of the Constitution. Section 86 of the Western Australia Administration Act is valid.

#### **Fugitive Offenders.**

*McKelvey v. Meagher*, (1906) 4 C.L.R., 265.—Until the Commonwealth Parliament otherwise provides the Fugitive Offenders Act (1881), which was in force in Victoria at the establishment of the Commonwealth, remains in force under section 108 of the Constitution and it should be interpreted and applied as if there were no federation, therefore the Governor, judges, the magistrates of Victoria, can, in the meantime, exercise in Victoria jurisdiction under the Imperial Act notwithstanding federation.

#### **Licence Fees.**

*Peterswold v. Bartley*, (1904) 1 C.L.R., 503.—The power of a State Legislature to impose licence fees upon persons carrying on a business of manufacturing particular articles is not restricted by the Federal Constitution. Brewers' licence fees are not duties of excise within sections 86 and 90 of the Federal Constitution and are therefore valid.

#### **The Law of Personal Property.**

*Duncan and Others v. The State of Queensland and another*, (1916) 22 C.L.R., at p. 556.—The reserved powers of the State under section 107 of the Constitution include the power to pass laws

relating to the sale, purchase, control, disposition and location of personal property within the State, directing that such property may be held *in custodia legis* or impressed with trusts for possible purchases such as by the Imperial Government or by the State Government itself. Such laws are not inconsistent with section 92 of the Constitution providing that trade, commerce and intercourse among the States shall be absolutely free.

### (3) SUMMARY OF COMMONWEALTH LAWS DECLARED INVALID.

Commonwealth Conciliation and Arbitration Act 1904 (No. 13 of 1904), section 4 (Settlement of disputes on State railways), declared by the High Court to be invalid so far as it purports to affect State railways. *Federated Amalgamated Government Railway and Tramway Service Association v. The New South Wales Railway Traffic Employees' Association*, (1906) 4 C.L.R., 488.

Section 38 (f) and (g) of the same Act (1914-15).—(Enforcement of common rule) declared by the High Court to be invalid so far as it purports to empower the Court of Conciliation and Arbitration to make a common rule in respect of any industry. *Australian Boot Trade Employees' Federation v. Whybrow and others*, (1910) 11 C.L.R., 311.

Section 30 of the Act 1904-15.—(State industrial laws and awards, invalid to extent of inconsistency with Federal award) held to be *ultra vires*. *Federated Saw Mill &c. Employees of Australasia v. James Moore & Son Pty. Ltd.*, (1908) 8 C.L.R., 465; *Australian Boot Trade Employees' Federation v. Whybrow and others*, (1909) 10 C.L.R., 266; *The King v. The Commonwealth Court of Conciliation and Arbitration*; *Ex parte Whybrow*, (1910) 11 C.L.R., 1; *Australian Boot Trade Employees' Federation v. Whybrow & Co.*, (1910) 11 C.L.R., 311.

Section 31 (1) of the Act 1904-15, providing that the Commonwealth Court of Conciliation and Arbitration shall not be subject to prohibition or mandamus, held to be ineffective and not binding on the High Court. *The King v. The Commonwealth Court of Conciliation and Arbitration*; *Ex parte Bris-*

*The King v. The Commonwealth Court of Conciliation and Arbitration and the Australian Tramway Employees' Association; Ex parte Brisbane and Adelaide Tramways Company (No. 2)*, (1914) 19 C.L.R., 43.—An industrial award granting preference to unionists in Queensland was declared void on the ground that it was contrary to the Queensland Industrial Peace Act 1912, passed before the award, and forbidding discrimination against any person for membership or non-membership of the union. *Per* GRIFFITH, C.J., and BARTON, J.

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*bane Tramway Co. and Adelaide Municipal Tramways Trust*, (1914) 18 C.L.R., 54; *Builders' Labourers' Case*, (1914) 18 C.L.R., 22.

Section 44, so far as it authorizes enforcement of penalties for breach of an arbitration award by the Commonwealth Court of Conciliation and Arbitration, is invalid. *Waterside Workers' Federation v. J. W. Alexander Ltd.*, (1918) 25 C.L.R.

Excise Tariff Act (No. 16 of 1906) imposing excise duties on the manufacture of certain agricultural implements and granting immunity to manufacturers who paid certain standard wages, held to be invalid. *The King v. Barger and The Commonwealth v. Mc Kay (Harvester Case)* (1908) 6 C.L.R., 41.

Trade Marks Act (No. 20 of 1905), Part VII., relating to workers' trade mark, held invalid. *The Attorney-General (N.S.W.) v. Brewery Employees' Union (N.S.W.)*, (1908) 6 C.L.R., 469.

Australian Industries Preservation Act (1906-7), sections 5 and 8.—Forbidding foreign and certain other trading corporations from entering into contracts in restraint of trade, held invalid. *Huddart Parker & Co. Ltd. v. Moorehead*, (1909) 8 C.L.R., 330.

Seamen's Compensation Act (1909), held invalid. *Owners of S.S. "Kalibia" v. Wilson*, (1910) 11 C.L.R., 689.

Land Tax Assessment Act (1910-12), section 36 (2).—Transfer of land from husband to wife and *vice versa* not recognized, held invalid. *Waterhouse v. Deputy Federal Commissioner of Land Taxes*, (1914) 17 C.L.R., 668.

Royal Commission Act (1902-12), declared invalid by Privy Council. *Attorney-General of the Commonwealth v. Colonial Sugar Refining Co. Ltd.*, (1913) 17 C.L.R., 644.

Inter-state Commission Act (1912), Part V., sections 23-44, relating to adjudication, held invalid. *The Commonwealth v. New South Wales (State)*, (1915) 20 C.L.R., 54.

Judiciary Act (1903-10), section 39 (2) (a) in effect taking away the right of appeal from a State Supreme Court to the Privy Council, is invalid. *Webb v. Outtrim*, (1907) App. Cas., 81; 4 C.L.R., 356.

## PART II.

## LEADING CASES REVIEWED.

The important case of *The Commissioner of Taxes of Victoria v. Wollaston (Wollaston's Case)*, (1902) 8 V.L.R., 57, was the first of a long series of Federal cases decided in Australia after the establishment of the Commonwealth involving the interpretation of the Constitution, and particularly raising the question of the Constitutional powers *inter se* of the Commonwealth and the States and the contested immunity of State and Federal means and instrumentalities of government from Federal or State interference. The Commissioner of Taxes of Victoria sued Dr. Wollaston, the Comptroller-General of the Commonwealth Customs Department, to recover income tax on his federal salary earned in Victoria. The Full Court of Victoria (*per* MADDEN, C.J., and Justices WILLIAMS and A'BECKETT) held that the defendant was liable to pay State income tax. It was held that the principle laid down by the Supreme Court of the United States (*per* Chief Justice MARSHALL) in the case of *McCulloch v. Maryland*, (1819) 4 Wheat., 316, "that a State has no right to tax any of the constitutional means employed by the Government of the Union to execute its constitutional powers or by taxation or otherwise to retard, impede, burden, or in any manner control the operation of the laws passed by Congress to carry into effect the powers vested in the national government," was not applicable to the interpretation of the Constitution of the Commonwealth.

The decision in *Wollaston's Case* was referred to and in effect over-ruled by *D'Emden v. Pedder*, (1904) 1 C.L.R., 91, the first great constitutional case decided by the High Court of Australia. It was there held, in consonance with the principle of *McCulloch v. Maryland*, that the provisions of the Tasmanian Stamp Receipt Act requiring every receipt given for a payment of money exceeding £2 to bear a stamp duty of 2d. could not be construed so as to apply to a receipt given for his salary by a federal officer in Tasmania; the ground being that such a tax, if enforced, would be an interference with a federal agent or instrumentality in the performance of his duty, and such agents and instrumentalities are entitled to absolute freedom from state interference or control except that prescribed by the Constitution: *D'Emden v. Pedder*, (1904) 1 C.L.R., 91.

Notwithstanding the decision of the High Court in *D'Emden v. Pedder*, which they distinguished, the Full Court of Victoria, (per MADDEN, C.J. and Justices A'BECKETT and HODGES) in *Webb v. Deakin*, (1904) 29 V.L.R., 748, re-affirmed *Wollaston's Case* and held that the remuneration of a member of the Parliament of the Commonwealth and that of a Minister of State for the Commonwealth are salaries, so far as they are earned in Victoria, were subject to taxation under the State Income Tax Act 1895, as income of such member or minister.

The case of *Webb v. Deakin* subsequently came before the High Court on appeal (*sub nomine*) *Deakin v. Webb*, (1904) 1 C.L.R., 585. The principle enunciated by the High Court in *D'Emden v. Peddar* was applied by the same Court to exempt the salaries of Federal ministers and members from the operation of State income tax laws : *Deakin v. Webb*, (1904) 1 C.L.R., 585. The decision of the State Full Court of Victoria in *Wollaston's Case* was thereby distinctly over-ruled.

In *Webb v. Outtrim*, (1905), another action to recover State income tax from a federal officer, the Full Court of Victoria followed the ruling of the High Court in *Deakin v. Webb*, and gave judgment for the defendant. Leave to appeal to the Privy Council was granted by the Supreme Court to the Commissioner. The Privy Council, (1906) App. Cas., 71, allowed the appeal ; held that an officer of the Commonwealth, resident in Victoria where he earns and receives his salary, as such officer, is liable to be assessed under the Income Tax Act of Victoria. The Privy Council gave judgment for the Commissioner of Taxes, refusing to follow the decision of the High Court in *Deakin v. Webb*.

This constitutional controversy was by no means settled by the decision of the Privy Council in *Outtrim's Case*. The State Governments of New South Wales and Victoria at once commenced actions against federal officers and members to recover State income tax. The State Courts, following the ruling of the Privy Council, gave judgments for the enforcement of the state taxes. In 1907 two of these cases came before the High Court on appeal : *Baxter v. Commissioner of Taxes, N.S.W.*, 4 C.L.R., 1087, and *Flint v. Webb, Commissioner of Taxes, Victoria, idem*, 1178. The High Court set aside the verdicts given by the State Courts in favour of the State Tax Commissioners and entered judgment for the defendants in both cases ; re-affirming its decision in *Deakin v. Webb* and refusing to follow that of the Privy Council in *Webb v. Outtrim*. So that

there are now on record two conflicting judgments on the same question of constitutional law, one by the Privy Council and the other by the High Court. See notes to covering clause v.

On the lines of *D'Emden v. Pedder* the High Court decided, in *The Commonwealth v. The State of New South Wales*, (1905) 3 C.L.R., 807, that a State Stamp Duty Act could not be applied to deeds and instruments of title by which lands are transferred to the Commonwealth; such documents are duty free.

A further application of the same principle of immunity on a different ground was made by the High Court in *Roberts v. Ahern*, (1904) 1 C.L.R., 406. In that case the appellant, a Commonwealth Government contractor, had been convicted in a Victorian Court of Petty Sessions for having carried soil from a post office at Inglewood, without having a licence so to do, and without having given security to the Borough Council as required by the Police Offences Act 1890, section 5. The High Court decided that the State Act does not purport to bind or affect the Government of the Commonwealth or its agents or contractors, in the conduct of operations in connection with federalized departments.

An interesting illustration of the meaning of the expression "State Rights" is to be found in the decision of the High Court in *Peterswald v. Bartley*, (1904) 1 C.L.R., 497, where the Court sustained the continued validity of the New South Wales Liquor Act 1898, under which persons engaged in the manufacture of beer were required to take out and pay for brewers' licences. It was contended by the defendant (the brewer) that as he paid to the Commonwealth excise duty on the manufacture of beer and as the right to impose excise duties was, by the Constitution, sections 86 and 90, exclusively vested in the Commonwealth, the exclusive federal power superseded the State brewer's licence law. But the Court considered that brewers' licence fees are not excise duties but regulation fees within the police powers of the States and therefore that the State liquor laws authorizing such licence fees continued in operation.

The rule laid down in *D'Emden v. Pedder*, 1 C.L.R., p. 111, declaring invalid and inoperative any State law, which would, if enforced, fetter, control, or interfere with the Federal Government, its officers and agents, is not restricted to Commonwealth rights, it is reciprocal. It is equally applicable to cases of attempted interfer-



ence by the Commonwealth with State instrumentalities. It was, therefore, held by the High Court in the *Federated Amalgamated Government Railway and Tramway Service Association v. New South Wales Railways Traffic Employees' Association*, (1906) 4 C.L.R., 489, that the Commonwealth Conciliation and Arbitration Act 1904, so far as it purports to affect State railways, is *ultra vires* and void, and, consequently, that an organization consisting solely of employees on State railways was not entitled to be registered under that Act.

In two remarkable and important cases, *The King v. Barger* and *The Commonwealth v. Mc Kay*, (1908) 6 C.L.R., 42, the High Court held that the Commonwealth Excise Tariff Act 1906 was not, in reality, an Act imposing duties of customs, as it purported to be, but was an Act designed to regulate the conditions and remuneration of labour in the manufacture of agricultural implements in Australia. As such it was an attempt to interfere with the internal, industrial and domestic affairs of the States. The Federal Parliament is not authorized to control such matters, and what is not authorized is forbidden, either expressly or by necessary implication. The power of taxation cannot be exercised so as to operate as a direct interference with such affairs. The pretended taxing Act was therefore declared to be *ultra vires* and void.

The power of the Federal Parliament does not extend to trade and commerce within a State. Consequently the power to legislate as to internal trade and commerce is reserved to the States by section 107, to the exclusion of the Commonwealth. When the intention to reserve any subject matter to the States, to the exclusion of the Commonwealth clearly appears, no exception should be admitted to that reservation which is not expressed in clear words. In accordance with these principles, Part VII. of the Commonwealth Trade Marks Act authorizing the registration of and giving proprietary rights in a "workers' label" is, in substance, an attempt to regulate the internal trade of the States, not within or incidental to any of the expressed powers conferred on the Parliament to regulate that trade. That part of the Act is therefore *ultra vires*, and, though its provisions, if limited to trade and commerce between the States, would be within the competency of the Commonwealth Parliament, it was impossible to separate that which was within from that which was without the power, and so the whole was declared invalid. So held, *per* GRIFFITH, C.J. and Justices BARTON

and O'CONNOR; Justices ISAACS and HIGGINS dissenting: *The Attorney-General of New South Wales v. The Brewery Employees' Union of New South Wales*, (1908) 6 C.L.R., 469.

The provisions of the Australian Industries Preservation Act, sections 5 and 8, so far as they attempt to regulate and restrict the powers of foreign corporations and trading and financial corporations formed under State laws in making contracts in restraint of trade and business carried on within the limits of a State and not extending to inter-state or external trade are invalid. The Federal Parliament cannot pass laws for the creation or dissolution of corporations. Such power is at present vested only in the States. *Huddart Parker & Co. Ltd. v. Moorehead*, (1909) 8 C.L.R., 330.

The Commonwealth Conciliation and Arbitration Court cannot legally make awards in inter-State industrial disputes inconsistent with the determination of State Wages Boards (such as those of Victoria) empowered by State statute laws to fix the minimum wages in certain trades and callings. Such Boards are subordinate legislative bodies and federal awards repugnant to the rates of pay fixed in advance by such Boards are void to the extent of repugnancy. *Federated Saw Mill Employees' Union v. Moore and others*, (1909) 8 C.L.R., 466; *The Australian Boot Trade Employees' Federation v. Whybrow and others* (special case), (1910) 10 C.L.R., 267.

The Commonwealth Court of Conciliation and Arbitration can only settle actual disputes between defined and ascertained parties, in judicial proceeding brought before it on summons or notice and cannot make a common rule or regulation enforcing labour conditions binding, like a by-law, absent parties or a trade or industry generally. Sub-section (f) of section 38 of the Conciliation and Arbitration Act 1914 (common rule) is therefore *ultra vires* and void. Such rules can only be made either directly by laws or by subordinate legislative bodies empowered so to do by State statute laws: *The King v. Commonwealth Court of Conciliation and Arbitration; Ex parte Whybrow and others* (prohibition case), (1910) 11 C.L.R., p. 1; *Australian Boot Trade Employees' Federation v. Whybrow and others* (special case), (1910) 11 C.L.R., 311.

The provisions of the Seamen's Compensation Act 1909, section 4, so far as they attempt to regulate the civil liability of the owners of ships engaged in trade or navigation from port to port within a State and not engaged in inter-state or external trade are *ultra vires*

and void. The States have exclusive control over their external trade and commerce which includes external shipping and navigation. The valid and invalid parts of the Act being interwoven and inseparable the whole Act was declared void: *Owners of the S.S. Kalibia v. Wilson*, (1910) 11 C.L.R., 689.

It is consistent with moderation to say, that of all the judicial decisions in the interpretation of the Constitution the two which caused most surprise and perturbation were one pronounced by the Privy Council, and the other by the High Court. In the case of *The Colonial Sugar Refining Co. Ltd.*, (1914) 17 C.L.R., p. 644, the Privy Council, over-ruling the High Court, held that the Commonwealth Royal Commission Act was *ultra vires* as dealing with the right of general inquiry reserved to the States, thus reducing to legal wreckage a carefully developed piece of machinery legislation, the loss of which has greatly inconvenienced the Government of the Commonwealth. The law advisers of the Commonwealth are greatly perplexed in their efforts to discover the grounds of the Privy Council's decision, and above all how to replace the lost Act which nearly everybody in Australia thought so fairly within the incidental power of Federal legislation.

The other decision which caused equal dismay was that of the High Court in the case of *New South Wales v. The Commonwealth*. (1915) 20 C.L.R., p. 55, confirmed and followed in *Duncan v. The State of Queensland*, (1916) 22 C.L.R., p. 557, in which it was held that State laws such as the New South Wales Wheat Acquisition Act and the Queensland Meat for Imperial Uses Act could legally authorize the acquisition of, or control by the States of private property in such a way as to indirectly interfere with the rule of inter-state free trade conferred by the Constitution, section 92.

Hence it would look as if the reserved powers of the States to nationalise, or even to hold in *custodia legis*, private property could, if exercised to its fullest extent, destroy the principle of inter-state freedom of trade which forms one of the basic reasons and advantages of Federal union. Such legislation, if persisted in by the States, will undoubtedly endanger the present system of Federal Government in Australia. The Acts referred to, however, may prove to have been the result of desperate efforts made by the States to deal with internal trade and commerce during extraordinary conditions arising from the war, and do not represent the normal policy of the States in time of peace.

## (5) THE RULE IN D'EMDEN v. PEDDER.

**Means and Instrumentalities of Government.**

The rule of construction formulated with precision and lucidity by the Chief Justice (Sir SAMUEL GRIFFITH), as the mouth-piece of the High Court, in *D'Emden v. Pedder*, (1903) 1 C.L.R., 91, was that, when a State attempts to give to its legislative or executive authority an operation which, if valid, would fetter, control or interfere with the free exercise of the legislative or executive power of the Commonwealth, the attempt, unless expressly authorized by the Constitution, is to that extent invalid and inoperative.

In the *Wollaston Case*, (1902) 28 V.L.R., 357, decided before the constitution of the High Court, the Full Court of Victoria refused to recognize the doctrine of implied prohibition and its view was afterwards sustained by the Privy Council in *Webb v. Outrim*, (1907) A.C., 81. On the other hand the High Court following the decisions of the Supreme Court of America in *McCulloch v. Maryland*, (1819) 4 Wheat., 316. *Collector v. Day*, (1870) 11 Wall., 113, and the Canadian case of *Leprohon v. The City of Ottawa*, (1877) 2 Ont. Ann. Rep., 522, held in *D'Emden v. Pedder*, (1903) 1 C.L.R., 91; *Deakin v. Webb*, 1 C.L.R., 558 and *Baxter v. The Commissioner of Taxation of New South Wales*, 4 C.L.R., 1087, that the doctrine of implied prohibition applied to exempt Federal instruments and the salaries of Federal officers from State taxation.

The rule in *D'Emden v. Pedder* is founded on the principles laid down by the Supreme Court of the United States in the great case of *McCulloch v. Maryland*, (1819) 4 Wheat., 316. The propositions affirmed by MARSHALL, C.J. in that case were first, that the grant of enumerated powers to the United States impliedly carries with it the grant of all proper means not expressly forbidden, to effectuate those powers; and next, that conversely, as such a grant of these powers and means would be entirely illusory unless their full and free exercise were intended, there arises a necessary implication that no State even to the least extent, can derogate from the grant by usurping the powers or, by obstructing the means of carrying them into execution.

The means, agencies and instrumentalities employed by the Federal Government to carry into operation the powers granted to it are necessarily and for the sake of self-preservation exempt from

taxation and interference in any substantial shape or form by the States. So also those means, agencies and instrumentalities necessary for or depending upon the reserved powers of the States should, for like reasons, be equally exempt from Federal taxation and interference. Their unimpaired existence is as essential in one case as in the other.

#### **No Express Prohibition.**

Yet there is no section in the Constitution which expressly prohibits the Federal Government from taxing the means and instrumentalities of the States nor is there anything prohibiting the States from taxing the means and instrumentalities of the Commonwealth. In both cases the immunity rests upon necessary implication and it is upheld by the great law of self-preservation seeing that any government whose agencies employed in conducting its operation are subject to the control of another and distinct government can exist only at the mercy of that other Government.

#### **The Doctrine of Implied Prohibition and Necessary Implication.**

There are several sections in the Constitution of the Commonwealth such as 114, 115, 116 and 117 which contain expressed limitations of the legislative powers of the Commonwealth and of the States. Although these sections are not framed in identical language they deal with the same matters as those dealt with by corresponding sections in the Constitution of the United States, hence both Constitutions contain express limitations and prohibitions, but it does not follow that such express limitations and prohibitions are exhaustive, or that they exclude the possibility of prohibitions and limitations arising from necessary implications.

The rule of construction known as the doctrine of implied prohibitions may be put this way. The States possess the reserved powers, and consequently control over internal trade. Therefore there is inhering in all the powers granted to the Commonwealth Parliament an implied prohibition against interference with the internal affairs of the States unless it is removed by express words or necessary implication.

This was the interpretation laid down and peculiarly illustrated in the case of the *United States v. Dewitt*, (1869) 9 Wall., p. 43, in which Chief Justice CHASE said "Congress has power to regulate commerce with foreign nations and among the several States and

with the Indian tribes ; the Constitution expressly declares so. But this express power to regulate commerce among the States has always been understood as limited by its terms, and as a virtual denial of any power to interfere with the internal trade and business of the separate States ; except, indeed, as a necessary and proper means for carrying into execution some other power expressly granted or vested."

In opposition to the Dewitt doctrine, the Canadian case of *The Grand Trunk Railway v. The Attorney-General of Canada*, (1907) App. Cas., 65, has been cited. The question for decision in that case was whether a Dominion Statute, which prohibited railway companies created by the Dominion Parliament from contracting out of a liability to pay damages for personal injuries to their servants, was within the competence of that Parliament. The validity of this provision was attacked on the ground that it was in substance an interference with "property and civil rights," matters reserved to the provincial legislatures under section 92 of the Constitution. It was not disputed that the power to make laws relating to through railways was entrusted to the Dominion. Under section 91 the question for determination was thus stated by Lord DUNEDIN, who delivered the judgment of the Board, (1907) A.C., 65, at p. 67 :—"The point therefore, comes to be within a very narrow compass. The respondent maintains . . . that this is truly railway legislation. The appellants maintain that, under the guise of railway legislation, it is truly legislation as to civil rights." After referring to the occasional overlapping of the field of Dominion and provincial legislation, he proceeded to say :—"Accordingly, the true question in the present case does not seem to turn upon the question whether this law deals with a civil right—which may be conceded—but whether this law is truly ancillary to railway legislation" : (1907) A.C., 65, at p. 68.

These two cases seem quite irreconcilable. The true method of deciding such questions under our constitution is where a Federal law purports to invade the field of domestic trade, commerce and industry reserved to the States, to ask the questions (1) what is the principal grant of Federal power ? (2) Is the law challenged within the principal grant or is it truly ancillary to the principal grant ? Any legislation outside one or the other of these two exclusive sources of Federal authority is prohibited ; hence in the *Federated Amalgamated Government Railway and Tramway Employees' Case*, (1906) 4 C.L.R., 488, it

was held that there was an implied prohibition against Federal interference with labour questions in State railways. In *The King v. Barger*, (1908) 6 C.L.R., 41, it was held that there was an implied prohibition against Federal interference with labour conditions generally reserved to the States. In the *Union Label Case*, 6 C.L.R., 469, it was held that there was an implied prohibition against Federal interference with the domestic commerce and industrial matters reserved to the States. In *Huddart Parker & Co. Ltd. v. Moorehead*, (1908) 8 C.L.R., 350, it was decided that there was an implied prohibition against Federal interference with questions of contracts made by corporations carrying on business within a State.

### **State Government Railways.**

In the *Federated Amalgamated Government Railway and Tramway Employees' Case*, 4 C.L.R., 538, it was contended that the doctrine of immunity did not apply to State Government railways which were not means and instrumentalities of Government within the rule of exemption.

### **State Government Liquor Trade.**

In support of this contention the case of *South Carolina v. United States*, 199 U.S., 437, was cited. There the Supreme Court of the United States, by a majority of five to four held that the State of South Carolina, which had made the liquor trade a State monopoly, could not invoke the doctrine so as to claim exemption from excise duties upon the liquor of which it made use. The argument in support of the application of that decision to the *Railway Case* was that the doctrine was limited to means and instrumentalities of a governmental character, and that the business of a common carrier is not a part of any of the recognized branches or functions of government. Dealing with this argument the Chief Justice (Sir S. GRIFFITH) said :—" Whether the majority judgment in *South Carolina v. United States* would or would not commend itself to this Court in a similar case, we are of opinion that it has no application to the present case. We apprehend, however, that the execution or administration of the laws of the State is, in the strictest sense, a governmental function, and that no rule can be formulated, because there is no authority competent to formulate it, which shall prescribe what functions the State shall undertake in the supposed exercise of its duty to promote the well-being of its people. There is high authority, both ancient and modern, for holding that the

construction and maintenance of roads and means of communication is one of the most important, as it is necessarily one of the first, of the functions of government." *The Federated Amalgamated Government Railway and Tramway Employees' Case*, 4 C.L.R., 538.

#### (6) A COMMON LAW OF THE COMMONWEALTH.

The common law of England forms part of the laws of each State of the Commonwealth, and as such may be administered by the High Court under Federal legislation. The High Court being a Court of Appeal is, subject to review by the Privy Council, the final arbiter of the common law in all the States. Several Acts of the Federal Parliament such as the Judiciary Act 1903, section 80, the Copyright Act 1905, section 7, the Trade Mark Act 1905, section 5, the Bills of Exchange Act 1909-12, section 5 (2), the Marine Insurance Act 1909, section 4, the Crimes Act 1914, section 4, expressly declare that the common law shall to the extent prescribed govern all Courts exercising Federal jurisdiction. Apart from these enactments it has been contended "that there is no Federal common law except in relation to the executive powers of the Crown; that there cannot be any Federal common law in Australia, and that the Federal Courts of the Commonwealth will not possess any jurisdiction under the common law." *A. Inglis Clark's Australian Constitutional Law*, at p. 192.

In contradistinction to the common law of the several States, there is in America growing up in the Federal Courts a common law of the United States, based equally upon the common law of England and of the several States. In the Federal Courts, both in civil and criminal matters there has been recognized, along certain lines, a common law of the United States which is certain to assert and re-assert itself more and more as the Federal jurisdiction grows and develops, particularly in cases involving the law merchant, the law of commercial paper and the like. The States may by Statute modify the common law of their States. Apart from such modification, by virtue of the right of independent interpretation possessed by the High Court and of its appellate jurisdiction, a uniform system of common law will be administered throughout the Commonwealth. See *Quick and Garran's Annotated Constitution*, p. 785.

There is a peace of the United States, as distinguished from the peace of the individual State, a breach whereof is possible within



the territorial limits of the State, as by an assault upon a Federal officer or Judge ; *per* MILLER, J. ; *In re Neagle*, (1890) 135 U.S., 69.

The question as to whether there is a common law of the Commonwealth applicable to the execution of its powers of administration, and whether such common law can be clothed with the form of Statute law by an Act of the Commonwealth Parliament was considered and to some extent approved by a majority of the High Court in *The King v. Kidman*, (1915) 20 C.L.R., p. 425. In that case the constitutionality of the retrospective operation of the Crimes Act 1915, section 2, was challenged in a criminal prosecution for conspiracy to defraud the Commonwealth. It was contended for the accused that the Act was not within the competence of the Commonwealth Parliament. The validity of the retrospective law was however sustained by the whole Court. The Chief Justice (Sir SAMUEL GRIFFITH) upheld it on the ground that whilst Parliament had no power to enact a criminal law operating only as *ex post facto* law, it had power under the Constitution, section 51 (xxxix.), to embody the common law of the Commonwealth applicable to the execution of its powers in the form of Statute and that such a Statute, so far as it refers to the Court in which the offence against it could be prosecuted, was a law of procedure and therefore could be construed as retrospective in its operation. " I have no difficulty in holding," said Chief Justice, " that the indictment in this case discloses an offence against the common law of Australia " : 20 C.L.R., p. 436. " This inquiry," continued the Chief Justice, " raises a large and important question, namely, whether there is any common law in Australia independent of the common law which forms part of the law of the several States. It is contended for the respondents that there is no such law, and American decisions were cited in support of this contention."

" It is clear law," said the Chief Justice, " that in the case of British Colonies acquired by settlement, the colonists carry their laws with them so far as they are applicable to the altered conditions. In the case of the Eastern colonies of Australia this general rule was supplemented by the Act 9 Geo. IV. c. 83. The laws so brought to Australia undoubtedly included all the common law relating to the rights and prerogatives of the Sovereign in his capacity as head of the Realm and the protection of his officers in enforcing them, including so much of the common law as imposed loss of life or liberty for infraction of it. When the several Australian

Colonies were erected this law was not abrogated, but continued in force as law of the respective Colonies applicable to the Sovereign as their head. It did not, however, become disintegrated into six separate codes of law, although it became part of an identical law applicable to six separate political entities. The same principles apply to laws of the United Kingdom of general application such as the Statute of Treasons. In so far as any part of this law was afterwards repealed in any Colony, it, no doubt, ceased to have effect in that Colony, but in all other respects it continued as before. When in 1901 the Australian Commonwealth was formed, this law continued to be the law applicable to the rights and prerogatives of the Sovereign as head of the States as before, subject to any such local repeal. But, so far as regards the Sovereign as head of the Commonwealth, the current which had been temporarily diverted into six parallel streams coalesced, and in that capacity he succeeded as head of the Commonwealth to the rights which he had had as head of the Colonies. I entertain no doubt that it was an offence at common law to conspire to defraud the King as head of the Realm, that on the settlement of Australia that part of the common law became part of the law of Australia, that on the establishment of the Commonwealth the same law made it an offence to conspire to defraud the Sovereign as head of the Commonwealth. Such a law, or to put it in other words, such a right to protection, seems, indeed, to be an essential attribute to the notion of sovereignty. I have, therefore, no difficulty in holding that the indictment in this case discloses an offence against the common law of Australia": *per* GRIFFITH, C.J., 20 C.L.R., 435-436.

Mr. Justice ISAACS based the validity of the law on the Constitution, section 51 (xxxix.), by which he held Parliament had authority to pass penal laws not only prospective but retrospective in their operation. He rejected the argument that an offence at common law was not a Commonwealth offence. "The Commonwealth," he held, "was endowed with all powers necessary to protect itself and punish those who endeavour to obstruct it. The common law of England was brought to Australia by the first settlers, and remains, as the heritage of all who dwell upon the soil of this Continent, in full force and operation except so far as it has in any portion of the land been modified by a competent Legislature. For State purposes and jurisdiction State laws may provide differently. But they cannot restrict the operation of the Constitution, and

whatever it implies it is the law of Australia, as much as if it were expressly so written. The necessary implication of unrestrictable right to perform its functions as a sovereign power—because in law it is the King who acts—carries with it the corollary that obstruction to the King in the exercise of his Commonwealth powers is, at common law, an offence with reference to the Constitution, and not with reference to any State law or the State Constitution.” : *per* ISAACS, J., 20 C.L.R., pp. 445-446.

Mr. Justice HIGGINS held that section 51 (xxxix.) settled the question beyond all doubt. “ I do not like to commit myself prematurely to any dogma with regard to what is called the ‘ common law of the Commonwealth ’ ; but,” he said, “ I concur with the Chief Justice in thinking that the cases in the United States Courts which reject the existence of a common law of the United States are—to say the least—inapplicable to our Constitution ” : *per* HIGGINS, J., 20 C.L.R., p. 454.

#### (7) CRIMINAL LAW OF THE COMMONWEALTH.

The Federal Constitution is singularly silent with reference to crimes, penalties and punishments. Only one penalty is imposed by it and that is, by section 46 which enacts that disqualified persons sitting as members of Parliament are liable to a penalty of £100. By section 53 it is assumed but not enacted that there is authority to pass laws imposing fines and pecuniary penalties.

There is not to be found in the Australian Constitution as there is in the British North America Act, section 91, any express power to legislate with respect to criminal law ; yet the Federal Parliament has passed laws imposing punishments and, in one case, the death penalty.

By the Constitution, section 51, sub-sections (i.) to (xxxviii.), there are specific grants of legislative power to make laws conferring rights and imposing duties on residents of the Commonwealth, but none of these sub-sections confer any general control over the liberty of the subject nor do they, on their face, appear to grant power to impose punishment for disobedience to such laws. Where, then, is its jurisdiction in criminal matters to be found ? A general control over liberty, it is conceded, must be shown to be transferred if it is to be regarded as vested in the Commonwealth Parliament. *The Attorney-General for the Commonwealth v. Colonial Sugar*

*Refining Company*, (1914) A.C., at p. 255 ; 17 C.L.R., p. 654, but there can now be no doubt regarding the control of the Commonwealth Parliament over the liberty of the subject in certain cases, and its power to impose punishment for disobedience to laws with respect to which it has power to legislate, such as the 38 subject-matters set out in section 51.

Some Federal writers have held that, even apart from and in the absence of any grant of necessary or incidental powers, Congress in America and the Parliament in the Commonwealth would have had authority to enforce the observance of its laws by the imposition of criminal sanctions or penalties for disobedience, otherwise the grant of legislative powers would have been abortive ; but section 51, sub-section (xxxix.) seems to place the matter beyond all doubt in Australia. It grants to the Federal Parliament power to make laws with respect to "all matters incidental to the execution of any power vested by the Constitution in that Parliament or either House thereof or in the Government of the Commonwealth or in the Federal Judicature, or in any department or office of the Commonwealth."

"In my opinion," said GRIFFITH, C.J., "the power of the Commonwealth Parliament to enact criminal laws is to be found in pl. xxxix. and nowhere else, and is a power to enact then as sanctions to secure the observance of substantive laws with respect to matters within the legislative, administrative or judicial power of the Commonwealth, and in that sense incidental to the execution of such powers": *The King v. Kidman*, 20 C.L.R., at p. 434.

Hence it is obvious that the offences as created and defined by such Acts as the Customs Act, for the prevention of smuggling, and by taxation acts for the protection of the revenue are well within the competence of the Federal Parliament. These penal laws are necessary and incidental to the execution and enforcement of the principal laws. Without the power of punishment for disregard all laws would be capable of evasion and would thereby be ineffective and impotent. This is not an implied power. It is not an inherent power. It is an independent and express power as high as any of the preceding 38 sub-sections of section 51 of the Constitution: *per* ISAACS, J. in *The King v. Kidman*, (1915) 20 C.L.R., at p. 441.

The criminal jurisdiction of the Federal Parliament is not only to be found scattered throughout various Acts of Parliament, but it has to some extent been codified and expressed in the Commonwealth Crimes Act, No. 12 of 1914, as amended by the Crimes Act, No. 6 of 1915. The first of these Acts deals, in Part II., with offences against the Commonwealth Government, defines the crime of treason and provides that any person found guilty thereof shall be liable to the punishment of death ; inciting to mutiny in the army and assisting prisoners of war to escape are declared to be indictable offences for which the penalty is imprisonment for life, Part III. defines offences against the Administration of Justice ; Part IV., offences against the coinage, Part V., forgery of Commonwealth instruments and documents ; Part VI., offences by and against public officers ; Part VIII., conspiracies against Commonwealth laws. The amending Act, No. 6 of 1915, passed 7th May, 1915, adds to the principal Act, section 86, a new offence as follows :—" Any person who conspires with another person to defraud the Commonwealth shall be guilty of an indictable offence." It is declared that the new law shall have a retrospective operation extending back to the passing of the principal Act, No. 12 of 1914, passed 29th October, 1914.

The validity of this law was sustained by the High Court in *The King v. Kidman (supra)*. It was so held by the whole Court on various grounds ; it was sustained by the Chief Justice (Sir SAMUEL GRIFFITH) on the grounds that it was an offence to common law to defraud the King as head of the Commonwealth and that the power conferred by sub-section (xxxix.) extends to enacting in the form of a declaratory Statute, the unwritten law of the Commonwealth. It was sustained by the other Judges on the ground exclusively that the law was authorized by sub-section (xxxix.).

When Parliament has power to prohibit an Act such as strikes and lock-outs it has the incidental power to impose punishment for the violation of such prohibition : *Stemp v. Australian Glass Manufacturing Co Ltd.*, (1917) 23 C.L.R., p. 226.

The Commonwealth Court of Conciliation and Arbitration presided over by a President being a Justice of the High Court appointed to the office of President for seven years, and not for life, during good behaviour, under the Constitution, has an arbitration power but not a judicial power, and consequently it cannot enforce its

own awards, by the imposition of penalties ; such awards, however, can be enforced by the High Court and by any State Court invested with Federal jurisdiction : *Waterside Workers' Federation v. J. W. Alexander Ltd.*, (1918) 24 C.L.R.

### (8) EX POST FACTO LAWS OF THE COMMONWEALTH.

In the Constitution of the United States, there is a clause, Article 1, section 9, which expressly prohibits Congress and the legislatures of the States from passing *ex post facto* laws. There is no such prohibition in the Constitution of the Commonwealth. The laws to which the term "*ex post facto*" is properly applicable are those laws by which, according to Sir WILLIAM BLACKSTONE'S definition, an act indifferent in itself when committed, the person who committed it is afterwards declared to have been guilty of a crime and made liable to punishment. There is another class of laws which have, in a sense, a retrospective operation and of which Statutes, commonly called Acts of indemnity and Acts which impose duties of customs as from the date on which they are proposed in Parliament afford familiar instances. Entirely different considerations are applicable to such laws. The objection to *ex post facto* laws would not apply to these measures : *per* GRIFFITH, C.J. in *The King v. Kidman*, 20 C.L.R., p. 435.

Retrospective penal laws are usually deprecated for unfairness but they may be justified in great emergencies. Where a legislature of supreme power such as that of the United Kingdom passes a retrospective criminal law, no question of its validity can arise. It can only be criticized on the ground of its impropriety or inexpediency. The legislative power of the Commonwealth Parliament is not plenary in the sense that its ambit includes any enactment on any subject whatever. As was pointed out by Lord HALDANE, the scheme of the Constitution was to select certain subjects, thirty-eight in number, which are enumerated in section 51 and most of which were already within the ambit of the legislative powers of the federating Colonies, and to confer upon the Federal Parliament power to legislate with respect to them. These subjects do not in terms include a power to legislate with respect to the criminal law. On this point, indeed, the Judicial Committee remarked that : — "None of them relate to that general control over the liberty of the subject which must be shown to be transferred if it is to be regarded as vested in the Commonwealth" : 20 C.L.R., p. 433.

Section 51, sub-section (xxxix.) declares to be within the legislative power of the Parliament "matters incidental to the execution of any power vested by this Constitution in the Parliament or in either House thereof, or in the Government of the Commonwealth, or in the Federal judicature, or in any department or officer of the Commonwealth." *Per* Lord HALDANE, L.C. in *The Attorney-General for the Commonwealth v. Colonial Sugar Refining Co.*, (1914) A.C., 237.

The High Court has held the words "Matters incidental" etc. to be sufficient to enable Parliament to pass penal laws for the purpose of enforcing obedience to Federal legislation and that such penal laws may be made to operate not only to punish future prohibited acts but to declare past acts, done before the enactment of the penal laws and innocent when done, to be criminal and punishable by fine or imprisonment. Such is the Crimes Act, No. 6 of 1915 (7th May, 1915), section 2 declaring that persons conspiring to defraud the Commonwealth shall be guilty of an indictable offence and making it operative as from 29th October, 1914. Such an Act is the English Trading with the Enemy Act 1914, followed by the Commonwealth Act on the same subject, but utterly unsustainable retrospectively unless the Parliament has power to pass *ex post facto* laws with reference to the limited subject matters under its control, where it thinks the occasion so grave as to demand such measures: *per* ISAACS, J. in *The King v. Kidman*, (1915) 20 C.L.R., p. 425.

"The war at present raging," said POWERS, J. "has, I think, proved beyond question that it was necessary for the defence of the Empire to pass *ex post facto* laws, and the British Parliament passed such laws. The war has also proved, I think, that it was necessary, for the proper defence of the Commonwealth during the present war, and during any future war—apart from pl. xxxix.—that Parliament should have the power to pass *ex post facto* laws to prevent assistance being given to the enemy. I do not find anything in the Constitution—an instrument of government—to lead me to hold that the Commonwealth Parliament, entrusted with the defence of the Commonwealth, is so impotent a body that aliens, neutrals or Australian subjects may defy His Majesty's Imperial Proclamation, and the Governor-General's Proclamation, upon the declaration of war, and openly commit breaches of a 'Trading with the Enemy Proclamation,' without any possibility of punishment by a

Commonwealth Statute ; and that only those breaches which are committed after a Commonwealth Act has been assented to are punishable in Australia, especially as Parliament may not be sitting at the time war is declared. I personally think it is not only incidental to the defence of the Commonwealth but also absolutely necessary for the proper defence of the Commonwealth, that the Commonwealth should have the power to punish by *ex post facto* laws any persons who, in Australia, defy His Majesty's Proclamation or the Governor-General's Proclamation, even if the Proclamation forbids acts that are not, at the time the Proclamation is published acts punishable by common law or State laws, if the acts interfere with the exercise of any power vested in Parliament or in the Government of the Commonwealth, and that can only be done by the people knowing that the Commonwealth Parliament has power to pass *ex post facto* laws. The power appears to me to have been exercised in England solely as incidental to the execution of the power to defend the Realm and for the purpose of defence. If the Commonwealth Parliament has power in time of war to pass *ex post facto* laws to prevent interference with the efficient defence of the Commonwealth, it has power to do so at any time. What laws it passes (if passed with respect to a matter as to which the Commonwealth has power to make laws) it is for Parliament, not this Court, to say. If it has power to pass *ex post facto* laws for the naval and military defence of the Commonwealth it has power to pass *ex post facto* laws incidental to the execution of any power vested by the Constitution in the Government of the Commonwealth, or in any department or officer of the Commonwealth " : *per* POWERS, J., 20 C.L.R., at p. 460.

### (9) THE POWERS INTER-SE OF THE COMMONWEALTH AND THE STATES.

The following are some leading canons of construction in Commonwealth Constitutional law derived from the foregoing cases :—

There are three sources of direct Constitutional authority to settle problems arising from the competition of Federal and State laws. The first is covering clause V. of the Constitution Act which states that " this Act and all laws of the Commonwealth under the Constitution shall be binding on the Courts, Judges and people of every State notwithstanding anything in the laws of any State." The second is section 109 of the Constitution which declares that " when the law of a State is inconsistent with a law of the Commonwealth the latter shall prevail and the former shall to the extent



of the inconsistency be invalid." The third source is to be found in the express prohibitions contained in sections 114, 115, 116 and 117, and in certain implications which arise from the nature of the Federal scheme as a whole; implications necessary to preserve the harmonious working of the two sets of legislatures which are parts of the dual system of Government.

It must be taken to be of the essence of the Constitution that the Commonwealth is entitled, within the ambit of its authority, to exercise its legislative and executive powers in absolute freedom and without any interference or control whatever except that prescribed by the Constitution itself. This is the proposition on which the immunity of State and Federal instrumentalities and agencies from Federal or State interference is based: *D'Emden v. Pedder*, (1904) 1 C.L.R., p. 109.

This rule of construction is reciprocal and applies to any case of the Commonwealth attempting to fetter, control or interfere with the free exercise of the legislative or executive power of the States as well as to the States attempting to interfere with or encroach on Commonwealth powers and functions: *The Attorney-General of New South Wales v. The Brewery Employees' Union of New South Wales*, (1909) 6 C.L.R., 469.

There is, however, a large class of cases with respect to which a similar power is for a time reserved to the States (concurrent powers). With respect to these matters there is consequently a possibility of conflicting legislation. This contingency is dealt with by section 109 of the Constitution, which provides that when a law of the State is inconsistent with a law of the Commonwealth the latter shall prevail, and the former shall to the extent of the inconsistency be invalid. "This sentence," said Sir SAMUEL GRIFFITH, "may be thus expanded supplying the *verba subaudita* :— 'When a law of a State otherwise within its competency is inconsistent with a law of the Commonwealth on the same subject, such subject being also within the legislative competency of the Commonwealth, the latter shall prevail': (1903) 1 C.L.R., 111. If, in exercising its acknowledged power to regulate its own purely internal, domestic trade or police affairs a State enacts laws which are contrary to an Act of the Federal Parliament passed in pursuance of the Constitution in the exercise of its control over inter-state commerce the Courts will enter upon the inquiry whether the State laws have come into collision with the Federal act and thereby deprived a citizen of a right to which the Federal Act entitled him.

Should a collision exist the State Act must yield to the Federal Act: *Gibbons v. Ogden*, (1824) 9 Wheat., 209.

With respect to matters within the exclusive competence of the Federal Parliament no question of conflict can arise, inasmuch as from the point at which the quality of exclusiveness attaches to the Federal power the competency of the State is altogether extinguished. So likewise with respect to matters within the exclusive competence of the State Parliament such as internal, police, commerce, domestic and industrial matters not extending beyond the limits of a State, the quality of its exclusiveness attaches to the State powers whether it has been exercised or not and the competence of the Federal Parliament to interfere with such State matters by an inter-state commerce law or by "a two-State" industrial award is denied. This is a further application of the doctrine of implied prohibition: *United States v. Dewitt*, (1824) 9 Wall., at p. 52.

#### (10) FEDERAL CONSTITUTIONS COMPARED.

##### **Applicability of American Decisions.**

In the official reports of arguments heard and judgments delivered in Constitutional cases in the High Court, the abundance and aptness of quotations from decisions of the Supreme Court of the United States on cognate questions is conspicuous. It has been suggested that the High Court has at times shown a preference for American over Canadian precedents. Preference is scarcely the word to use but the reason for such preference, if any, is obvious. The Constitution of the Commonwealth has been framed largely on the model of that of the United States to which it bears a nearer resemblance than it does to that of Canada.

The distribution of legislative powers in the Constitution of the United States is shown in the following diagram in which the powers of the Federal Government and those of the States are placed in separate compartments:—

#### CONSTITUTION OF THE UNITED STATES.

Art. I., Sec. VIII.	10th Amendment.
Exclusive specified Federal powers. <i>E.g.</i> Inter-state trade; customs and excise.	Exclusive, reserved powers of the States. <i>E.g.</i> Police powers and internal trade.
Concurrent powers of the Union and the States in which in cases of inconsistency the laws of the Union prevail.	

The following diagram shows the distribution of the legislative powers in the Constitution of the Australian Commonwealth ; and the resemblance of the American and Australian Constitutions :—

#### CONSTITUTION OF THE AUSTRALIAN COMMONWEALTH.

Sections 51, 52, 90.	Section 107.
Exclusive specified Commonwealth powers. <i>E.g.</i> Inter-state trade, customs and excise.	Exclusive reserved powers of the States. <i>E.g.</i> Police powers and internal trade.
Concurrent powers of the Commonwealth and the States in which in all cases of inconsistency the Commonwealth law prevails.	

The framers of the Australian Constitution were familiar not only with the Constitution of the United States but with that of Canada. When, therefore, we find embodied in the Constitution of the Commonwealth provisions undistinguishable in substance from the provisions of the Constitution of the United States which before the sittings of the Australian Convention in 1897 had been judicially interpreted by the Supreme Court of that Republic, it is not an unreasonable inference that those framers intended that like provisions should receive like interpretation: *D'Emden v. Pedder*, (1903) 1 C.L.R., 103. It is a matter of common knowledge that the leading members of the Australian Convention were particularly well acquainted with the two great examples of English-speaking Federations and that in the distribution of powers between the Commonwealth and the States they deliberately followed the plan of the United States of America in preference to that of the Dominion of Canada: *Deakin v. Webb*, 1 C.L.R., 606. Hence, whilst the American decisions were in no way binding on the High Court the Chief Justice (Sir SAMUEL GRIFFITH) pointed out in one case that they could be regarded as "a most welcome aid and assistance" in any analogous controversy. It was in these circumstances that the High Court followed the decision of the Supreme Court of the United States in *McCulloch v. Maryland*, 4 Wheat., 316.

In *Webb v. Outtrim*, (1907) App. Cas., 88, the Privy Council (*per* THE EARL OF HALSBURY) questioned the supposed analogy between the Constitution of Australia and that of the United States. "There is," he said, "no such analogy between the two systems of

jurisprudence as the learned Chief Justice of the High Court suggests. No State of the Australian Commonwealth has the power of independent legislation possessed by the States of the American Union. Every Act of the Victorian Council and Assembly requires the assent of the Crown, but when it is assented to, it becomes an Act of Parliament as much as any Imperial Act, though the elements by which it is authorized are different. . . . The American Union, on the other hand, has erected a tribunal which possesses jurisdiction to annul a Statute upon the ground that it is unconstitutional."

With reference to the power of "independent legislation" possessed by the States of the American Union; this is, of course, as pointed out by Sir SAMUEL GRIFFITH literally true only in a limited extent. There is a veto power over the American State Legislatures as effectual as the veto power over any Australian Legislature. True, there is no monarch in America to disallow laws proposed by American State Legislatures but the power of veto is nevertheless vested in State Governors. Nor can the Federal Government of the United States veto State Acts as can be done by the King in Council with reference to proposed colonial laws. At the same time the State Legislatures are only "independent" when acting within the powers and sphere assigned to them by the Constitution. If they purport to pass laws in excess of their Constitutional authority whilst those proposed laws cannot be disallowed by a monarch, they may be pronounced null and void by the Supreme Court of the United States in a suit between parties properly brought before it. So that the American States are no more "independent" than the Australian States whose laws in like circumstances, may be passed upon by the High Court.

Within the British Empire, said the Chief Justice, the power of reserving proposed colonial laws for the royal assent and the power vested in the Sovereign to disallow proposed colonial laws is exercised with great caution and only on rare occasions when some question of Imperial interests or constitutionality appears on the face of the Bill. The power of disallowance, he said, would in many circumstances be of no avail to prevent conflicts between State and Federal legislation. Thus in the case of State laws passed before the establishment of the Commonwealth, or State laws discovered to be in excess of State powers after the expiration of the time limited for disallowance, the power of disallowance would be of no value; it

would be too late to call into action. In either case the assent once given or the time for disallowance having expired the Act would be binding until pronounced invalid by a Court of competent jurisdiction. But there is no very great difference between the judicial power of "annulling" invalid laws in the United States and within the British Empire. "Annulment" is not the correct term to apply to the result of a judicial decision *inter partes*. Even under the British Constitution (Colonial Laws Validity Act 1865) colonial laws repugnant to Imperial Statutes extending to the colonies are null and void and may be so declared by any Court of competent jurisdiction asked to enforce them. This is all that has been done in such cases as *D'Emden v. Pedder* and *Deakin v. Webb*. The applicability of certain State Acts was questioned because they were repugnant to the true meaning of the Commonwealth Constitution Act which is undoubtedly an Imperial Act extending to the States.

The Privy Council judgment in *Webb v. Outtrim* (*supra*) affirms that "the American Union, on the other hand, has erected a tribunal which possesses jurisdiction to annul a Statute upon the ground that it is unconstitutional." Referring to this paragraph the Chief Justice (Sir SAMUEL GRIFFITH) said :—"The Supreme Court of the United States was created by a provision in the American Constitution identical with that by which the High Court was created. The power of the Supreme Court of the United States to decide whether an Act of Congress or of a State is in conformity with the Constitution depends upon and follows from the Constitution itself, which is, by section 2 of Article VI., declared to be the Supreme law of the land, as the Australian Constitution is declared to be by Clause V. of the Constitution Act. Such questions must certainly arise under a Federal Constitution, and must be determined by the Courts before which they are raised. Their Lordships seem to have thought that the High Court had asserted a power to declare a law invalid on the ground that it was 'unconstitutional,' using that word in some vague general sense, but meaning something different from a contravention of the written Constitution."

"The High Court of Australia," said the Chief Justice, "never asserted any such power, nor did it ever occur to it to treat the word 'unconstitutional,' as used in the American Courts, as meaning anything more than contrary to and forbidden by the Constitution, nor have those Courts ever claimed to do anything more than construe the written Constitution by the light of recognized canons.

English jurisprudence has always recognized that the Acts of a legislature of limited jurisdiction (whether the limits be as to territory or subject-matter) may be examined by any tribunal before whom the point is properly raised. The term 'unconstitutional,' used in this connection, means no more than *ultra vires*": *Baxter v. Commissioner of Taxes, New South Wales*, (1907) 4 C.L.R., 1125.

### Some Canadian Cases.

In *Wollaston's Case*, 28 V.L.R., 357, the Full Court of Victoria refused to apply the *ratio decidendi* of the judgment of the Supreme Court of the United States in *McCulloch v. Maryland*, 4 Wheat., 16, to the interpretation of the Constitution of the Commonwealth and cited the judgments of the Privy Council in two Canadian cases in which Provincial laws were held to prevail over Dominion powers, namely: *Citizens Insurance Co v. Parsons*, (1881) 7 App. Cas., 96, and *The Bank of Toronto v. Lambe*, (1887) 12 App. Cas., 575. The same two cases were subsequently quoted in the High Court in support of the operation of State laws over Federal laws.

On the other hand Canadian cases have been cited in support of the operation of Federal laws over State laws. Thus in the *Federated Saw Mill Employees' Federation v. Moore and Others*, (1909) 8 C.L.R., 466, and the *Australian Boot Trade Employees' Federation v. Whybrow and Others*, (1910) 10 C.L.R., 266, it was decided by a majority of the High Court (GRIFFITH, C.J. and BARTON and O'CONNOR, JJ.) that the Commonwealth Conciliation and Arbitration Court could not make an award inconsistent with the determination of a State Wages Board constituted by State Statute laws with authority to pre-determine the minimum rates of pay in any trade or calling. This was one of the most important rulings in constitutional law ever given by the High Court of Australia. In support of the superior force and operation of a Federal award the dissenting Justices (ISAACS and HIGGINS, JJ.) relied on the judgment of the Privy Council in the *Grand Trunk Railway Co. of Canada v. The Attorney-General of Canada*, (1907) App. Cas., 65.

It is advisable therefore to consider the whole question of the applicability of Canadian cases to the interpretation of the Australian Constitution. There is a fundamental difference in the distribution of legislative powers between the Dominion of Canada and the Provinces of Canada and the distribution of powers between

the Commonwealth of Australia and the States of Australia. In the Constitution of the United States and that of the Commonwealth there are numerous distinctive features in common presenting a remarkable contrast in whole and in parts to the Constitution of Canada. In the Australian Federal system we find the field of legislative power divided between the Parliament of the Commonwealth and the Parliaments of the States by a method very different from that by which legislative power is distributed by the British North America Act, and very different relations are created between the Commonwealth and the States when compared with the relations created by British North America Act between the Dominion and the Provinces of Canada.

The legislative powers of the Federal Parliament are enumerated and determined by grants coupled with prohibitions express or implied to be found within the instrument. The Legislatures of the States are left in possession of an undefined residuum of the plenary legislative powers which they exercised before the establishment of the Commonwealth. The extent and limits of that residuum can only be determined by reference to the enumerated Federal powers and the prohibitions express or implied, to be found within the instrument. There is an exclusive Federal area of legislative authority in which the States may never legislate. There is a concurrent legislative area in which both the Federal and State Parliaments may pass laws subject to the rule that in case of inconsistency the law of the Commonwealth prevails.

#### (11) INAPPLICABILITY OF CANADIAN CASES.

Let us now turn to the Constitution of the Dominion of Canada and note the contrast. In Canada there is an elaborate express and exhaustive division of the whole field of legislative authority among the Dominion and the Provinces. There is an explicit grant of exclusive legislative power to the Parliament of the Dominion over a number of matters specifically mentioned in section 91, together with a general grant of exclusive legislative power to the Parliament of the Dominion over all other matters not included among those assigned exclusively to the Provincial Legislatures by section 92. There is an equally explicit grant of exclusive legislative power to the Provincial Legislatures over a number of matters specifically mentioned in section 92, including direct taxation.

The distribution of the legislative powers in the British North America Act is shown in the following diagram in which the powers of the Dominion and those of the Provinces are placed in separate compartments.

#### CONSTITUTION OF THE DOMINION OF CANADA.

<p>Section 91. Exclusive specified Dominion powers. <i>E.g.</i> Regulation of trade and commerce ; customs and excise.</p>	<p>Section 92. Exclusive specified Provincial powers, <i>E.g.</i> Property, civil rights, direct taxation, shop, saloon, licences</p>
<p>Residuary exclusive Dominion power, <i>e.g.</i> general taxation.</p>	

The distribution of the legislative powers in the Australian Constitution Act as given in the following diagram, shows the contrast between the Canadian and the Australian Constitutions :—

#### CONSTITUTION OF THE AUSTRALIAN COMMONWEALTH.

<p>Sections 51, 52, 90. Exclusive specified Commonwealth powers, <i>E.g.</i> Inter-state trade, customs and excise.</p>	<p>Section 107. Exclusive unspecified reserved powers of the States, <i>E.g.</i> Police powers and internal trade.</p>
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Concurrent powers of the Commonwealth and the States in which in all cases of inconsistency the Commonwealth law prevails.

In the Canadian Constitution there is no clause stating that in case of conflict or inconsistency the Dominion law prevails over the Provincial law. There is no arbitrary rule determining the superiority of a Dominion law over a Provincial law. The rule of construction as laid down by the Privy Council is :—" If they find that on the due construction of the Act a legislative power falls within section 92, it would be quite wrong of them to deny its existence because by some possibility it may be abused, or may limit the range which otherwise would be open to the Dominion Parliament." Such was the *ratio decidendi* of the judgment in the *Bank of Toronto v. Lambe*. The appellant had contended that the Provincial Legislature of Quebec was not empowered by section 92 of the British North America Act to impose the tax on banks which the appellant had refused to pay ; and the argument of the appellant was that



if the language of section 92 was interpreted so as to empower the Provincial Legislatures to impose the bank tax in question, it would be in conflict with the language of section 91, which conferred upon the Parliament of the Dominion exclusive legislative power in respect of all the matter therein specifically mentioned, and therefore the meaning of section 92 must be controlled and restricted by the language of section 91.

In order to determine whether a Provincial Legislature had the power to impose the tax on banks, the Privy Council had to decide two questions, viz. : (1) Did the tax come within the description of direct taxation which the Provincial Legislatures were expressly empowered to impose by sub-section 2 of section 92 ? (2) If the tax did come within the description of direct taxation assigned to the Provincial Legislatures, in accordance with the ordinary meaning of the language of the description, was there anything in section 91, or in any part of the British North America Act, which restricted the meaning of the language used in sub-section 2 of section 92, so that it should not include the tax in question ? The Board decided that the tax on banks did come within the description of direct taxation assigned to the Provincial Legislatures, and that its meaning was not controlled or restricted by anything contained in section 91. The same method of inquiry has been observed by the Privy Council in other cases in which they have been required to decide whether a particular matter which has been included in any impugned legislation of a Provincial Legislature was within the exclusive legislative power of the Parliament of the Dominion or within the exclusive power of the Provincial Legislatures. Mr. Justice INGLIS CLARK, *Commonwealth Law Review*, vol. 1, p. 197.

Therefore, in Canada, the validity of any impugned legislation of a Provincial Legislature always depends upon the true meaning and scope of particular words used in section 92 of the Act, but the language of section 91 is examined for the purpose of ascertaining in accordance with the settled rules for the interpretation of Statutes, whether it can be properly regarded as qualifying or controlling the meaning of the particular words of section 92 which are to be construed.

In Australia where State and Federal legislation is impugned, the question of validity involves a series of inquiries relating to the legislative powers of the States and the Commonwealth *inter se*,

and it cannot in any case be determined like a question of the validity of impugned legislation in Canada. The express grant of power to the Federal Parliament coupled with express or implied prohibitions must be examined. The reserved legislative powers of the States are not specified and cannot be examined or identified one by one as those of the Provinces of Canada can be.

"The process of interpretation is entirely different in the Australian Constitution from that in the Canadian Constitution. The question of an alleged encroachment by the Parliament of the Commonwealth upon the field of legislative power reserved to the States," says Mr. Justice INGLIS CLARK "must frequently involve the consideration of the extent to which the legislative powers of the States are necessarily curtailed by the Constitution, or made subject to the exercise of a superior legislative power vested in the Commonwealth. This inquiry involves in its turn a consideration of the effect of the impugned legislation upon the political autonomy of the States. The effect of a law of the Commonwealth upon the political autonomy of the States is not the primary test of its validity; but the effect of the law may reveal its essential character and thereby assist in the determination of the question, whether it is within any of the powers specifically granted to the Commonwealth. The legislative powers of the States ought not to be declared to be curtailed or limited by the Constitution to any larger extent than that to which the purposes for which the Commonwealth was established require them to be curtailed and limited. The absence of any power in the Governor-General of the Commonwealth in Council to disallow any legislation of a State is in itself a clear indication that, in contrast with the Constitution of the Dominion of Canada, the purpose of the Constitution of the Commonwealth is to fully preserve the political autonomy of the States, in respect of all matters which are not placed by the Constitution within the legislative power of the Parliament of the Commonwealth": *Commonwealth Law Review*, vol. 1, p. 200.

"The explicit declaration of covering Clause V. of the Australian Constitution Act and of section 109 of the Constitution do not settle all problems of interpretation. They do not relieve the judiciary of the task of determining the boundary lines of the legislative powers of the Commonwealth and the States, in many cases of alleged encroachment, by a consideration of the purposes for

which the Constitution was established and the respective positions *inter se* which the Commonwealth and the States were intended to occupy under it. In other words, a clear recognition of the Federal character of the system established by the Constitution of the Commonwealth is indispensable to a true interpretation of its provisions": *Commonwealth Law Review*, vol. 1, p. 201.

## (12) AMERICAN AND CANADIAN CONSTITUTIONS.

(NOTES by SIR ROBERT GARRAN).

### The United States Constitution.

Canadian cases as to the distribution of power, when applicable at all to the Australian Constitution, must be applied with the greatest caution. American cases, on the other hand, are often applicable in their entirety; but here, too, there are differences which, though they concern details rather than principles, are so important that they must be carefully borne in mind.

The scheme of distribution of powers is as follows:—

- (1) Congress is given legislative power as to specified matters only (Article I., section 8)—including "all laws which shall be necessary and proper for carrying into execution" the powers vested by the Constitution in Congress or the Executive.
- (2) The powers of the State Legislatures are residuary. They are not given exclusive power as to any specified subject-matter; but they retain exclusive power wherever the power of Congress cannot reach (Tenth Amendment; *cf.* Australian Constitution, sections 107-109).
- (3) Few of the powers of Congress are expressed to be exclusive; and except as to these few, the State Legislatures retain *concurrent* power, though State laws must always yield when inconsistent with valid Acts of Congress.

These principles are substantially identical with those of the Australian Constitution; but their application is modified by the following important differences:—

- (1) The enumerated subject-matters of Federal legislative power are much fewer, *e.g.*, Congress has no power to make laws as to bounties, quarantine, fisheries, banking, insurance, bills of exchange and promissory notes, trade

marks, corporations, railway acquisition and construction in the States, or industrial arbitration—except so far as these subjects may be included in some other enumerated power, such as trade and commerce among the States.

- (2) The power of Congress as to inter-state and foreign commerce has (with some qualifications) been held to be exclusive—a construction which in the Australian Constitution is negated by the express words of section 107. This distinction is extremely important in connection with many of the American decisions as to the commerce power.
- (3) The American Constitution contains many express prohibitions, directed against either Congress or the State Legislatures, or both, which are not found in the Australian Constitution. *E.g.* the prohibitions against laws compelling an accused person to criminate himself, or depriving any person of property without “due process of law” (Fifth Amendment); against Federal or State “*ex post facto*” laws, State laws “impairing the obligation of contracts,” and Federal “direct” taxes unless apportioned among the States in proportion to population. Many American decisions which at first sight appear to be applicable in Australia are found on close inspection to turn on one or other of these prohibitions.

### The Canadian Constitution.

The provisions of the Canadian Constitution as to the distribution of power are extremely complex. The leading principles are :—(1) That the subject-matters of provincial legislation are *specific*, those of the Dominion Parliament partly specific and partly *residuary*. (2) That the powers both of Dominion and Provinces are mutually *exclusive*.

Both these principles, however, require to be stated with very important qualifications. In the first place, the Constitution attempts to enumerate specifically some of the powers of the Dominion Parliament. We thus have two sets of enumerated powers, mutually exclusive; and yet these two fields are found in practice to overlap. The result has been a series of ingenious attempts, by judicial decision, to reconcile the two, with results which may be

shortly stated as follows :—Where there is over-lapping of enumerated powers, the field is “concurrent,” and where in this concurrent field Dominion and Provincial legislation clash, the Provincial legislation to that extent gives way. Thus the specific powers of the Provinces are in a sense residuary. Dominion laws which are “ancillary” to either the residuary or the specific powers of the Dominion Parliament are valid even though they incidentally encroach on the specific powers of the Provinces.

The following is an analysis of the mode of distribution :—

### **Dominion Legislative Powers.**

(1) General (residuary) power given by section 91—to make laws for the peace, etc. of Canada in relation to all matters not enumerated in section 92 as exclusive powers of the Provinces. This power can only be exercised for matters national in character, and not comprised in the enumerated powers of the Provinces : *Attorney-General for Ontario v. Attorney-General for Canada*, (1896) A.C., p. 348.

(2) Matters *enumerated* in section 91. These are not deemed to come within any of the 16 classes enumerated in section 92 : *Attorney-General for Ontario v. Attorney-General for Canada*, (*supra*) ; over-ruling dictum in *Citizens Insurance Co. v. Parsons*, 7 A.C. ; where it was held that this provision only applied to class 16 of section 92.

(3) Matters “ancillary” to residuary or enumerated powers.

### **Provincial Legislative Powers.**

These are matters enumerated in section 92, but exclusive of matters enumerated in section 91. The Dominion has two kinds of legislative power :—residuary and specific. The Provinces have one kind of legislative power, which is specific ; but is at the same time residuary in the sense that it only covers so much of the enumerated matters in section 92 as are not included in the enumerated matters in section 91.

### **Concurrent Powers.**

Though there are no subject-matters of express concurrent power (with one exception relating to agriculture) the existence of what is really a concurrent field has been established by judicial decision. Though the enumerated powers of the Dominion and the Provinces are expressed as *exclusive*, they overlap.

Where there is over-lapping of enumerated powers of the Dominion and the Provinces respectively, neither legislation will be *ultra vires* if the field is clear ; if on this " concurrent " field the two legislations meet, Dominion legislation prevails : *Attorney-General of Ontario v. Attorney-General of Canada*, (1894) A.C., 189 ; *Tennant v. Union Bank of Canada*, (1894) A.C., 31 ; *Grand Trunk Railway of Canada v. Attorney-General of Canada*, (1907) A.C., 65.

This prevalence of Dominion legislation appears to extend to legislation—

- (1) covered by enumerated Dominion power ;
- (2) ancillary to enumerated Dominion power ;
- (3) ancillary to *general* Dominion power.

See *Lefroy, Legislative Power in Canada*, pp. 347, 353, 526.

### Canadian Cases.

These propositions may be illustrated by reference to a few of the leading Canadian cases.

*Citizens Insurance Co. v. Parsons*, and *Queen Insurance Co. v. Parsons*, 7 A.C., 96.—The Dominion Parliament passed an Act requiring all insurance companies, whether incorporated by foreign, Dominion, or Provincial authority, to obtain a licence, to be granted only upon compliance with prescribed conditions. An Act of the Province of Ontario, dealing with policies of insurance entered into or in force in the Province of Ontario for insuring property in the Province against fire, prescribed certain conditions which were to form part of such contracts. The Provinces have exclusive power to legislate as to " property and civil rights within the Province." The Dominion has exclusive power to legislate as to " the regulation of trade and commerce." It was therefore held that the Ontario Act relates to " property and civil rights within the Province " and not to " the regulation of trade and commerce," that it is therefore not inconsistent with the Dominion Act, and it is valid.

It is important to note that the questions for decision were :—

- (1) Is the subject-matter of the Provincial Act enumerated in section 92 ? If not, it is invalid ; if so, it is valid, unless (2) the subject-matter is also enumerated in section 91 and so withdrawn from section 92.

It was claimed on behalf of the Citizens' Insurance Co. that being incorporated under Dominion law it could not be controlled

by Provincial law ; but the Court pointed out that the Provincial Act did not assume to interfere with the constitution or status of corporations.

The decision is based on the complex provisions of sections 91 and 92, which it is held must be read together and the language of one interpreted and where necessary modified by that of the other, so as to reconcile the respective powers they contain and give effect to all of them.

Though the Court held that the Dominion power to regulate trade and commerce did not include the regulation of the contracts of a particular trade in a single Province, it does not therefore follow that the Dominion Parliament might not have the power, by a general law relating to all the Provinces, to regulate such contracts—in which case its legislation would over-ride that of the Provinces. It is stated in *Hodge v. The Queen*, 9 A.C., at page 130, that the principle illustrated by the case of the *Citizens' Insurance Co.* and the case of *Russell v. The Queen*, 7 A.C., 829, “ is that subjects which in one aspect and for one purpose fall within section 92 may in another aspect and for another purpose fall within section 91.”

*The Colonial Building Co. v. Attorney-General of Quebec*, 9 A.C., 157, at p. 166.—One of the enumerated exclusive legislative powers of the Province is “ the incorporation of companies with provincial objects.” The incorporation of companies does not fall within any enumerated power of the Dominion Parliament, but under its general or residuary power the Dominion Parliament has power to incorporate companies other than those with provincial objects.

The Colonial Building Company was incorporated in Canada generally by a Dominion Act, but had not yet exercised its powers outside the Province of Quebec. It was held that the fact of the non-exercise of powers did not affect the validity of the incorporating Act nor the status of the corporation thereunder. Inasmuch as the power to incorporate companies is a residuary and not an enumerated power of the Dominion Parliament, it is subject to the enumerated exclusive powers of the Provinces.

*Attorney-General of Ontario v. Attorney-General of the Dominion*, (1896) A.C., 348, at p. 363.—A Dominion Act (the Canada Temperance Act of 1886), applicable to the whole of the Dominion, gave to the electors of every county or city the option of adopting the provisions

of the Act prohibiting the sale of intoxicating liquor. An Act of the Province of Ontario empowered every town council in the Province to make by-laws for prohibiting the retail sale of intoxicating liquor. Held as to the Dominion Act that it was valid under the general power of legislation as relating to the peace order and good government of Canada ; but not as " regulating trade and commerce " because the power to regulate did not include a power to prohibit. Held also that the Dominion general power of legislation in supplement to its enumerated powers must be strictly confined to matters of unquestionable national interest and importance, and must not trench on any enumerated subjects of the Provincial powers unless they have obtained national importance. Held as to the Provincial Act (1) that it was not authorized by the enumerated powers to legislate as to the municipal institutions in the Province" ; (2) that it was authorized as relating to one or other but not to both of the following powers :—" Property and civil rights in the Province " or " Generally of matters of a merely local or private nature in the Province." It was held also that the Provincial Act was not invalid, though, in localities in which the Dominion Act was adopted, it might have to yield for repugnancy.

As regards the Dominion powers of legislation, the principle of the decision is that a " general " or " residuary " Federal power cannot trench on an enumerated or specific Provincial power. It has no application to the Commonwealth Constitution, except in the converse case, because in Australia the residuary powers belong to the States, the specific powers to the Commonwealth. So far as the decision shows the superiority of a specific to a residuary power, it is wholly in favour of the Commonwealth as against the State.

*Canadian Pacific Railway Co. v. Corporation of the Parish of Notre Dame de Bonsecours*, (1899) A.C., 367, at p. 372.—The Canadian Pacific Railway Co. had been fined under a Provincial Act for not cleaning a ditch forming part of the C.P.R. works. Held that, though the Provincial Legislature had no power to regulate the structure of a ditch forming part of the works of a railway authorized by Dominion laws, it could, under the power to deal with local matters within the Province, prescribe the cleaning of the ditch and the removal of obstructions. The decision follows from the exclusive power of the Provinces as to local matters. The principle is the same as in *The Colonial Building Co. v. Attorney-General of Quebec* (*supra*).



*Grand Trunk Railway v. Attorney-General of Canada*, (1907) A.C., 66.—The Dominion Parliament passed a law to prevent railway companies within the Dominion jurisdiction from “contracting out of liability for injuries to servants.” This was held valid as railway legislation under an enumerated power of the Dominion, notwithstanding that it incidentally affected civil rights within the Province.

The principle of the decision is that, where enumerated powers overlap, Dominion legislation prevails. In other words, where two exclusive powers meet on a common field, the Canadian Constitution is interpreted as leaving that field concurrent, and the result is then the same as in cases in the United States or Australia where the legislation in exercise of or incidental to the exercise of an enumerated power of the Federal Government comes into conflict with State legislation passed in the exercise of the residuary power; if the Federal law is in substance an exercise of Federal legislative power the State law, though valid in the absence of Federal legislation, yields to the Federal law in case of conflict.

*Toronto Corporation v. Canadian Pacific Railway*, (1908) A.C., 54.—The Dominion Railway Act provides for certain works for the protection of the public at level crossings on the C.P.R. and for the adjustment and recovery of the cost from persons interested. The Railway Committee of the Privy Council of Canada, in pursuance of the Act, directed the cost of the protection of certain level crossings in Toronto to be apportioned between the railway and the city. Held that the municipality was a person liable, and that the Dominion Act imposing this liability on the city was valid as general railway legislation, notwithstanding that it affected civil rights. The principle of the case is precisely similar to that of the *Grand Trunk Railway Case* (*supra*).

# COMMONWEALTH OF AUSTRALIA CONSTITUTION ACT<sup>(a)</sup>

(63 & 64 VICT. c. 12).

AS ALTERED BY

CONSTITUTION ALTERATION (SENATE ELECTIONS) 1906  
(No. 1 OF 1907).

AND BY

CONSTITUTION ALTERATION (STATE DEBTS) 1909  
(No. 3 OF 1910).

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An Act to constitute the Commonwealth of Australia.

[9th July, 1900.]

WHEREAS<sup>1</sup> the people of New South Wales, Victoria, South Australia, Queensland, and Tasmania, humbly relying on the blessing of Almighty God, have agreed<sup>2</sup> to unite in one indissoluble Federal Commonwealth under the Crown<sup>3</sup> of the United Kingdom of Great Britain and Ireland, and under the Constitution hereby established :

And whereas it is expedient to provide for the admission into the Commonwealth of other Australasian Colonies and possessions of the Queen :

Be it therefore enacted by the Queen's Most Excellent Majesty, by and with the advice and consent

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(a) NOTE.—This print of the Constitution Act contains all the alterations of the Constitution which have been made up to and including the 31st December, 1918. The Acts by which the Constitution was altered are the *Constitution Alteration (Senate Elections)* 1906 assented to 3rd April, 1907, and the *Constitution Alteration (State Debts)* 1909 assented to 8th August, 1910.

of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :—

§ 1. "WHEREAS THE PEOPLE."

**Declaratory not Enacting Effect of Preamble.**

In the case of *Jacobson v. Massachusetts*, (1905) 197 U.S., 11, an unsuccessful attempt was made in argument to found substantive rights upon the words of the preamble of the Constitution of the United States. A compulsory vaccination law of the State of Massachusetts was claimed to be invalid as being repugnant to the declaration in the preamble that the Constitution was ordained "in order to . . . secure the blessings of liberty to ourselves and our posterity."

The Supreme Court of the United States, however, made short work of this argument. "We pass without extended discussion," they said, "the suggestion that the particular section of the Statute of Massachusetts now in question is in derogation of rights secured by the preamble of the Constitution of the United States. Although that preamble indicates the general purposes for which the people ordained and established the Constitution, it has never been regarded as the source of any substantive power conferred on the Government of the United States or on any of its departments. Such powers embrace only those expressly granted in the body of the Constitution and such as may be implied from those so granted. Although, therefore, one of the declared objects of the Constitution was to secure the blessings of liberty to all under the sovereign jurisdiction and authority of the United States, no power can be exerted to that end by the United States unless, apart from the Preamble, it be found in some express delegation of power or in some power to be properly implied therefrom: 1 *Story's Constitution*, § 462." 197 U.S., at p. 22. The Court added, significantly, that the liberty secured by the Constitution "does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint."

To the same effect was the observation of Mr. Justice ISAACS in the *Federated Saw Mill Employees v. James Moore & Sons Proprietary Ltd.*, (1908) 8 C.L.R., at p. 535, that if covering Clause V. and section 109 of the Constitution, which formed the keystone of

the Federal structure, were loosened "Australian union was but a name, and would reside chiefly in the pious aspirations for unity contained in the Preamble to the Constitution." Note by Sir ROBERT GARRAN.

## § 2. "AGREED."

### A Federal Compact.

The Constitution of the Commonwealth is included in and receives the sanction of law from an Imperial Statute, yet it is, nevertheless, founded upon and is the result of a compact or agreement between the people of the pre-existing colonies. The fundamental basis as well as the most prominent feature of the Federal compact is the distribution of powers between the Commonwealth and the States. *Per* GRIFFITH, C.J. in the *Colonial Sugar Refining Co. Ltd. v. Attorney-General of the Commonwealth*, (1912) 15 C.L.R., 194. It is a familiar and popular description of the Federal Constitution to say that it is a compact. In the same case upon appeal to the Privy Council their Lordships lent additional sanction to the use of the term "compact." "Their Lordships," said Lord HALDANE, H.C., "are called on to interpret the legislative compact made between the Commonwealth and the States, and they have to determine on the language of the Statute what rights of legislation the federating colonies declared to be reserved to themselves. It is clear that any change in the existing distribution of powers has been safe-guarded in such a fashion that on a point such as that before the Board the Commonwealth Parliament could not legislate so as to alter that distribution merely of its own motion": (1914) App. Cas., at p. 237.

The Constitution Act is not only an Act of the Imperial Legislature, but it embodies a compact entered into between the six Australian Colonies which form the Commonwealth. This is recited in the preamble to the Act itself. *Per* GRIFFITH, C.J. in *Federated Amalgamated Government Railway and Tramway Service Association v. New South Wales Railway and Traffic Employees' Association*, (1906) 4 C.L.R., at p. 534.

This doctrine of a "Federated Compact" is not likely to lead to the promulgation of a Constitutional heresy similar to that which took place in the United States in the days of Calhoun which led to the Civil War of 1862-64.

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### § 3. "THE CROWN."

#### **Imperial Unity and Division.**

The Crown is a symbol of the combined unity and division of Imperial Sovereignty. It is the legal evidence of the visible central authority, the King in Parliament which unites and holds together the British Empire with its multitudinous peoples and its complex divisions of political power. The Crown, however constitutionally, represents not only the United Kingdom of Great Britain and Ireland but also those autonomous communities beyond the sea upon which the rights and privileges of local self-government branches of sovereignty, have been conferred by Imperial legislation. Thus the Crown may be considered as representing the Dominion of Canada, the Commonwealth of Australia and the South African Union, in each of which there is a Governor-General being the King's Representative, but it also represents the several Provinces of Canada and the States of Australia in which there are Provincial and State Governors. This differentiation of the Crown, considered from various constitutional standpoints, has been referred to and recognized in several cases which have come before the High Court of Australia for consideration.

#### **Not Bound by Statute unless Named.**

In *Ahern v. Roberts*, (1904) 1 C.L.R., 406, the rule that the Crown, and consequently the State or Commonwealth, is not bound by legislation unless it appears in the face of the Statute that it was intended it should be so bound, was considered and explained. The informant was the Inspector of Nuisances for the Borough of Inglewood (Victoria). The defendant was employed to cart night-soil from the Post Office at Inglewood by one Appleby, who had contracted with the Commonwealth Government to carry out necessary sanitary operations in connection with those premises. The defendant, without having obtained a licence from the Borough Council, and without having given the required security to the Council carted night-soil away from the Post Office premises. He was prosecuted under section 5, sub-section 7, of the Police Offences Act 1890. The defence was that he was authorized by the Commonwealth Government, through the post-master, to do the act complained of. The defendant was convicted and fined. He obtained special leave to appeal from that decision to the High Court: (1903-4) 1 C.L.R., 406.

The Chief Justice (Sir SAMUEL GRIFFITH) said :—

“ Various points were raised and discussed before us, but in the view that we take of the matter, it is not necessary to consider more than one of them, namely, whether section 5 of the Victorian Police Offences Act when it was passed bound the Executive Government of Victoria. It is not disputed that, if it did not bind the Victorian Government, it does not now bind the Federal Government, to which the rights and obligations of that Government in respect of the Post and Telegraph Department have been transferred. It is a general rule that the Crown is not bound by a Statute unless it appears on the face of the Statute that it was intended that the Crown should be bound by it. This rule has commonly been based on the Royal prerogative. Perhaps, however, having regard to modern developments of constitutional law, a more satisfactory basis is to be found in the words of ALDERSON, B., delivering the judgment of the Court of Exchequer in *Attorney-General v. Donaldson*, 10 M. & W., 117, at p. 124. The Executive Government of the State is not bound by Statute unless that intention is apparent. The doctrine is well settled in this sense in the United States of America. With regard to the Statute now under consideration, so far from its text suggesting a clear intention to control the action of the Executive Government, a contrary intention is, *prima facie*, more probable. At the time when the Act was passed, the Executive Government had the control of many great institutions—gaols, orphanages, asylums, police barracks, Government departments of all sorts, and occasionally military encampments—and it is, *prima facie*, unlikely that the Legislature should have intended to subject the Executive Government to the uncontrolled discretion of a local authority with regard to sanitary arrangements of such institutions. Such a construction would have rendered the Executive officers of the States themselves liable to prosecution whenever they procured any such act to be done without the licence of the local authority, or without giving security to its satisfaction. . . . In our judgment, therefore, the provision in question did not affect the Victorian Government, and does not now affect the Federal Government or its agencies in the management of the Post and Telegraph Department ” : 1 C.L.R., 406.

#### The Crown Represents Commonwealth and State as Separate Juristic Persons.

In the case of the *Municipal Council of Sydney v. The Commonwealth*, (1904) 1 C.L.R., 208, which was an action to recover municipal rates, the Chief Justice of the High Court (Sir SAMUEL GRIFFITH) said :—

“ It is manifest from the whole scope of the Constitution that, just as the Commonwealth and State are regarded as distinct and separate sovereign bodies, with sovereign powers limited only by the ambit of their authority under the Constitution, so the Crown, as representing those several bodies, is to be regarded not as one, but as several juristic persons, to use a phrase which well expresses

the idea. No better illustration can be given than is afforded by the lands now sought to be rated, which, having originally been 'property of the State,' i.e. lands of the Crown in New South Wales, have become vested in the Commonwealth, i.e., vested in the Crown in right of the Commonwealth. The change in constitutional ownership is accurately and unmistakably denoted by the language of section 85 in which it is expressed. The term 'the Crown' as used in the Sydney Corporation Act must be taken to mean the Crown in its capacity as representing the State of New South Wales. In the Act of 1879, passed before the establishment of the Commonwealth, it obviously had that meaning, and no wider one can be given to it in the re-enactment of 1902. The argument, therefore, sought to be founded upon the assent of the Crown, given through the Governor of New South Wales, to the taxation of Crown lands, fails, since land vested in the Commonwealth or in the Crown in right of the Commonwealth is not Crown land within the meaning of the Sydney Act. Nor, in my judgment, can the liability of the land, while Crown land of New South Wales, to municipal taxation be regarded as a liability running with the land, any more than if the land had afterwards been granted for a purpose which would exempt it from such liability": 1 C.L.R., 231.

In the construction of Commonwealth Statutes the rule that the Crown is not bound by a Statute except by express words or necessary implication applies only to those representatives of the Crown who have Executive authority in the place where the Statute applies, and as to matters to which that Executive authority extends. The Constitution binds the Crown as represented by the various States, and takes no account of the States and State Governments in relation to Commonwealth legislation on matters within the exclusive control of the Commonwealth Government. Therefore, in the construction of Commonwealth Statutes dealing with such matters, the rule applies to the Sovereign as head of that Government, but not to the Sovereign as head of the State Governments. In other words in the construction of a Commonwealth Statute the Crown, as representing the Commonwealth, is not bound unless it is expressly named, but the Crown as representing the States may be bound although it is not expressly mentioned, if the Commonwealth Parliament has constitutional authority to legislate in a matter affecting the States, in common with private individuals.

The Customs Act 1901, being a valid exercise by the Commonwealth of the exclusive power to impose, collect and control duties of customs and excise conferred by sections 52 (II.), 86, and 90 of the Constitution, applies to goods imported by the Government of a State as well as to those imported by private persons; and

therefore, goods imported by a State, whether dutiable or not, are by section 30 of the Act subject to the control of the customs, and the authority of the State Executive is no justification for their removal from that control contrary to the provisions of the Act. A quantity of wire netting, which had been purchased in England and imported into the Commonwealth by the Government of New South Wales was landed at the port of Sydney. Without any entry having been made or passed, and without the authority of the customs officers, the defendant, acting under the authority of the Executive Government of the State, removed the goods from the place where they were stored. In an action to recover a penalty it was held by the High Court that the defendant had committed a breach of sections 33 and 236 of the Customs Act. *The King v. Sutton*, (1908) 5 C.L.R., 789.

The Chief Justice (Sir SAMUEL GRIFFITH) said :—

“ The rule that the Crown is not bound by a Statute unless expressly mentioned, or unless it appears by necessary implication that it was intended to bind the Crown, is a rule of construction, the object of which, as of other rules of construction, is to give effect to the intention of the legislature. If it appears clearly that the intention was that the Crown should be bound, effect is given to this rule by so holding. This being the meaning of the rule, it follows that it does not apply to every person who in any part of the world represents the Crown, but only to those representatives of the Sovereign who have executive authority in the place where the law applies, and even there, only as to matters to which that executive authority extends. The Crown, as the head of the Commonwealth Government, is for many, if not all, purposes a separate juristic person from the Crown as head of a State Government. In matters under the exclusive control of the Commonwealth Government the doctrine applies to the Sovereign as head of that Government, but has no application to the Sovereign as head of the State Governments.” : *The King v. Sutton*, (1908) 5 C.L.R., pp. 795, 796, and 797.

On the other hand if the Commonwealth Parliament has no constitutional authority to legislate in a matter affecting the States the States will not be bound, even if they are expressly mentioned in a Commonwealth Statute. Thus the Commonwealth Conciliation and Arbitration Act, section 2, purported to give the Arbitration Court power to make industrial awards affecting railways the property of a State, but the High Court held that law to be invalid as not within the competence of the Parliament : *Federated Amalgamated Government Railway and Tramway Service Association v.*



*New South Wales Railway Traffic Employees' Association*, (1906) 4 C.L.R., 489.

In the case of *The Commonwealth v. The State of New South Wales*, (1905-6) 3 C.L.R., 808, the High Court decided that the memorandum of transfer of land held under the Real Property Act (New South Wales) to the Commonwealth for Commonwealth purposes under section 3 of the Property for Public Purposes Acquisition Act 1901, is not liable to stamp duty, and therefore the Commonwealth is entitled to have such instrument marked exempt by the Commissioner for the purposes of registration under the Real Property Act. The Stamp Duties Act (New South Wales), was not intended to impose, and did not impose, any obligation on the Crown when it was passed, and therefore does not now impose any obligation upon the Commonwealth. Even if the Act, when passed did affect the Crown as representing the community of New South Wales, it could not, after the establishment of the Commonwealth be construed as affecting the Crown as representing the Commonwealth.

If the New South Wales Stamp Duties Act were made expressly applicable to Commonwealth titles, it would have been invalid as it is beyond the competence of a State law to interfere with Commonwealth instrumentalities.

Short title.

1. This Act<sup>4</sup> may be cited as the Commonwealth of Australia Constitution Act.

#### § 4. "THIS ACT."

This Act, to constitute the Commonwealth, consists of nine clauses, sometimes described as "covering clauses" to distinguish them from the sections of corresponding numbers in the Constitution. To each clause is annexed a marginal note. The marginal notes do not form parts of the Act; they are provided merely as brief summaries. In these commentaries, the notes, printed, in the authorized edition of the Act, at the sides or against the clauses and sections, will be found placed at the head of or immediately over each clause or section.

Clause 1 gives the short title of the Act; clause 2 declares that it extends to the Queen's successors; clause 3 provides that the

Queen may issue a proclamation appointing a day when the people of the federating Colonies shall be united in a Federal Commonwealth ; clause 4 specifies when the Commonwealth is to be deemed legally established ; clause 5 provides for the legal operation of the Act and of the laws of the Commonwealth ; clause 6 defines " Commonwealth," " States," and " Original State " ; clause 7 repeals the Federal Council Act, 1885 ; clause 8 applies the " Colonial Boundaries Act, 1895," to the Commonwealth ; clause 9 enacts the Constitution of the Commonwealth, so that the Constitution is unquestionably a part of the Act.

In the Commonwealth Bill as introduced into the Imperial Parliament, the Constitution was, at the suggestion of the Crown law officers, annexed as a Schedule to the Bill ; but in committee the original form of the Bill was restored.

The nine clauses of the Act cannot be amended by the Parliament and the people of the Commonwealth, but only by the British Parliament. The amending power contained in the Constitution is applicable to the Constitution only which is annexed to clause 9.

Act to extend to the Queen's successors.

2. The provisions of this Act referring to the Queen<sup>5</sup> shall extend to Her Majesty's heirs and successors in the sovereignty of the United Kingdom.

### **§ 5. " REFERRING TO THE QUEEN."**

#### **The Crown when Bound.**

As to the provisions in a Commonwealth or State Act by which the Crown may be bound : see Note, § 3 " The Crown."

Proclamation of Commonwealth.

3. It shall be lawful for the Queen, with the advice of the Privy Council, to declare by proclamation that, on and after a day therein appointed, not being later than one year after the passing of this Act, the people of New South Wales, Victoria,<sup>6</sup> South Australia, Queensland, and Tasmania, and also, if Her Majesty is satisfied that the people of Western Australia have agreed thereto, of Western Australia, shall be united<sup>7</sup>

in a Federal Commonwealth under the name of the Commonwealth of Australia. But the Queen may, at any time after the proclamation, appoint a Governor-General for the Commonwealth.

§ 6. "VICTORIA ; SOUTH AUSTRALIA."

**Boundary Question.**

The boundary between the Colony of South Australia and that portion of the original Colony of New South Wales which now forms the State of Victoria was fixed by 4 and 5 Will. IV., c. 95, and by Letters Patent thereunder of 19th February 1836, as the 141st meridian of East Longitude. In 1847, by the authority of the Governors of New South Wales and South Australia and with the knowledge and approval of the Secretary of State, a line was located and marked on the ground as being the 141st meridian, but was in fact, as was discovered in 1869, about two miles to the westward of that meridian. The line so marked was proclaimed by the respective Governors as the boundary and was the *de facto* boundary thenceforward. From 1869 onwards the Government of South Australia protested against the continuation of the error in the marking out of the boundary and sought to have it rectified, but without result. In 1910 an action was brought in the High Court, by the State of South Australia against the State of Victoria for a declaration that the strip of land between the 141st meridian and the line so marked out was part of the territory of South Australia.

It was held by the High Court that an authority was to be implied in the Governors of South Australia and New South Wales jointly, possibly without, and certainly with, the concurrence of the Crown signified through a Secretary of State, to permanently locate and mark on the ground that boundary as soon as circumstances called for exercise of that authority ; and that, if the boundary having been so located and marked was afterwards found to have been marked and located in the wrong place, the error could not thereafter be corrected by any judicial authority. It was further held that South Australia had no right of which the High Court could take cognizance. The High Court : *Per GRIFFITH, C.J.*, and Justices BARTON, O'CONNOR and ISAACS ; HIGGINS, J., dissenting : *South Australia v. Victoria*, (1911) 12 C.L.R., 668.

## § 7. "SHALL BE UNITED."

**British Possessions.**

The original Australian Colonies are transformed into States and united into a Federal Commonwealth, but they retain their respective individualities and entities as separate "British Possessions" within the meaning of several Imperial Statutes. By the Fugitive Offenders (Imperial) Act 1881, it is enacted that the jurisdiction under Part I. of that Act to hear a case, and commit a fugitive to prison, to await his return to the part of the Empire from which he fled shall be exercised in the British possession in which he is arrested, by any Judge, Justice of the Peace, or other officer having the like jurisdiction as one of the magistrates of the Metropolitan Police Court in Bow Street, or by such other Court, Judge, or Magistrate, as may be from time to time provided by an Act or Ordinance passed by the Legislature of that possession. By virtue of section 39, the expression "British possession," means in that Act, unless the context otherwise requires, any part of His Majesty's dominions, exclusive of the United Kingdom, the Channel Islands, and the Isle of Man; but all territories and places within His Majesty's dominions, which are under one Legislature, are to be deemed to be one British possession, and one part of His Majesty's dominions. The expression "Legislature," where there are local Legislatures as well as a central Legislature means the central Legislature only. In the case of *Re Mc Kelvey v. Meagher*, (1906) 27 A.L.T., p. 198; (1906) V.L.R., 304, which came before the Full Court of Victoria in 1906, it was contended that after Federation, Victoria became one of a group of States, constituting the Commonwealth of Australia, having a central Legislature within the meaning of the Act; that Victoria had, therefore, ceased to be a British possession within the meaning of the Imperial Act; and that Mr. Panton, a Victorian Police Magistrate, had no jurisdiction to hear the case, on the ground that he was a magistrate of Victoria only, and not a magistrate of the Commonwealth.

It was further argued that Sir JOHN MADDEN, by whom the warrant was backed, had no jurisdiction to endorse it, as he was only a Judge of the Supreme Court of Victoria and not of the Commonwealth; and the Commonwealth was the part of His Majesty's dominions, and the territory within which the fugitive was when arrested. It was contended that the only Judge of a superior Court who could endorse the warrant under section 3, would be a Judge

of a superior Court of the Commonwealth, and that the only magistrate who could act under section 5 would be a magistrate of the Commonwealth.

The Acting Chief Justice (HOLROYD, J.) said :—

“ When the Fugitive Offenders Act was passed, nearly nineteen years before the Commonwealth Constitution Act, the Colony of Victoria was unquestionably one of the British possessions, and if it has ever lost that character, that can only be by virtue of the definition clause before referred to, and in such territories and places only within His Majesty's dominions as are under one central Legislature. It may be difficult to define what is intended by the words ‘ central legislature ’ ; but, as it appears to me, in declaring that British territories, which severally enjoyed a greater or less degree of local self-government, but had already, or should thereafter become subject in various matters to a higher legislative authority, should be deemed to form one part of His Majesty's dominions, the object of the Imperial Parliament must have been to enable the confederate body, if it pleased, to exercise those powers of arresting and returning fugitive offenders, which by the same Act, were being conferred upon the British dependencies composing, or which might thereafter compose, the confederation. It does not necessarily follow that any dependency of the British Crown should cease to be a British possession, because such a dependency is for a special purpose to be deemed to constitute, together with other dependencies, one British possession, and one part of His Majesty's dominions. The Imperial Act which we have been considering was intended to facilitate the arrest of fugitive offenders, and their return to the place whence they had fled ; and, in my opinion, the 39th section does not oblige us to hold that separate colonies, by the mere act of confederating, deprived themselves of a jurisdiction which had been conferred upon them severally for that very purpose.”

Mr. Justice A'BECKETT, said :—

“ I agree with the first branch of the argument, and accept the view that where we have to consider, for the purposes of the Fugitive Offenders Act, with regard to acts done in Victoria, in what British possession were they done, we should say that they were done in the Commonwealth of Australia. But it does not appear to me to follow from this that Victoria has ceased to be one of the units of complete criminal jurisdiction, with the ordinary administrative machinery which the Act intended to be used in the exercise of the powers which it conferred. This view, if correct, would dispose of both the objections to which I have referred, but I think that, even if we were constrained to hold that the words in section 3, ‘ in another part of Her Majesty's dominions,’ were to be read as ‘ in the Commonwealth of Australia,’ a Judge of the Supreme Court of Victoria would still be a Judge of a superior Court in the Commonwealth of Australia, though he is not a Judge appointed by the Commonwealth. ‘ In such part ’ is not equivalent to ‘ of such part.’ All that, it seems to me, would be necessary would be that the Judge exercising jurisdiction should do so in accordance with the law of

the Commonwealth, and this a Victorian Judge does although his powers are derived from the Government of Victoria, not from the Commonwealth": *In re Mc Kelvey*, 27 A.L.T., p. 198; (1906) V.L.R., 304.

The Victorian Full Court upheld the validity of the warrant and the prisoner was remanded for extradition.

*Mc Kelvey's Case* subsequently came before the High Court on appeal, (1906) 4 C.L.R., 265. The Chief Justice (Sir SAMUEL GRIFFITH) in delivering the judgment of the Court sustaining the decision of the Full Court of Victoria said:—

"I am, therefore, of opinion that unless the Commonwealth Parliament has power under the Constitution to make laws under section 32 of the Imperial Fugitive Offenders Act 1881, or to deal with the surrender of fugitive offenders between the Commonwealth and other parts of the British dominions, the establishment of the Commonwealth has had no effect whatever upon the position and authority of the State of Victoria with regard to this Act. I am disposed to think—although it is not necessary to express any definite opinion upon the subject—that the power conferred upon the Commonwealth Parliament to make laws with respect to external affairs probably includes the power to pass necessary laws to give effect to this Act. If it does not, then the establishment of the Commonwealth in no way affected the operation of administration of this Act in Victoria. If, on the other hand,—which I think is more probable—the Constitution does empower the Commonwealth Parliament to deal with the subject of the rendition of fugitive offenders, all difficulty is removed by the express words of section 108 of the Constitution."

"It was contended that the administration of the Fugitive Offenders Act 1881 was not a law in force in Victoria at the time of the establishment of the Commonwealth within the meaning of section 108 of the Constitution. I can see no force in that contention. Amongst the powers possessed by the Governor, the Judges, and the magistrates of Victoria were powers under the Fugitive Offenders Act 1881, and the law which enabled them to exercise those powers was a law in force in Victoria, and, in my opinion, still continues a law there": *Mc Kelvey v. Meagher*, (1906) 4 C.L.R., 278.

#### Commencement of Act.

4. The Commonwealth shall be established<sup>8</sup> and the Constitution<sup>9</sup> of the Commonwealth shall take effect, on and after the day so appointed. But the Parliaments of the several colonies may at any time after the passing of this Act make any such laws, to

come into operation on the day so appointed, as they might have made if the Constitution had taken effect at the passing of this Act.

§ 8. "ESTABLISHED."

**Starting the Machinery of Government.**

The establishment of the Commonwealth of Australia involved the setting in motion of the machinery of a complete new Government—with legislative, executive and judiciary organs—distinct from, and supplementary to, the six State Governments already existing. It is obvious that all this new machinery could not be set up, and started in full working order, in a single day. It was easy to proclaim that the Constitution of the Commonwealth should take effect on a certain day; but on that day, and for many days after, only very small instalments of actual political union could be achieved. Departments had to be organized, and laws passed; and in order that laws might be passed, and the Executive Government be given the representative character which would enable it to exercise its functions, it was first of all necessary that elections of members of the first Commonwealth Parliament should be held, and that the Parliament should meet and settle down to business.

The process of starting the machinery had received a good deal of attention from the framers of the Constitution; and the Constitution itself, and the covering clauses of the Imperial Act in which it is embodied, contain many provisions relating to the initiatory stage, and designed to enable the federal machinery to be set in motion smoothly and gradually. These provisions may be classified as follows:—

1. Provisions for the performance of certain preliminaries before the actual establishment of the Constitution, to come into effect immediately upon the establishment (covering clauses 3, 4).
2. Provisions for the piecemeal transfer to the Commonwealth of certain functions theretofore belonging to the States (sections 69, 70).
3. Provisions for supplying the initial want of federal legislation by means of—

(a) temporary legislation laid down by the Constitution itself, "until the Parliament otherwise provides"; and

(b) the temporary adaptation of State laws to Federal requirements (sections 9, 10, 29, 30, 97).

4. The general scheme of the Constitution, which, in respect of most of the matters within the legislative power of the Commonwealth Parliament, allowed to the States a concurrent legislative power so far and so long as the field remained unoccupied by the Commonwealth Parliament (sections 107-109).

Thus, on the 1st January 1901, the Commonwealth was fairly launched, with a Governor-General at the helm and an Executive Council to advise him; with seven Ministerial departments, namely, the Departments of External Affairs, the Attorney-General, Home Affairs, the Treasury, Trade and Customs, Defence, and the Postmaster-General. But the only actual transfer of departmental functions which took place on that day was that of the Departments of Customs and Excise (see section 69, *infra*). And even with regard to them, the only immediate change was that the control passed to the Commonwealth Government, and the revenue from that time went into the Federal Treasury, to be dealt with in accordance with the Constitution. The six State tariffs continued in force as before, until such time as the Federal Parliament should frame an Australian tariff; inter-state duties continued to be collected on the State borders; the State Customs laws and regulations, and the State Public Service Acts, so far as they affected the transferred officers, continued in force with the substitution of Federal for State authorities; and every officer of customs and excise continued to perform his duties as before, except that he was now an officer, not of his State, but of the Commonwealth (see sections 69, 70 and 84).—Note by Sir ROBERT GARRAN.

## § 9. "CONSTITUTION OF THE COMMONWEALTH."

### Reference to History.

In the interpretation of the Commonwealth Constitution reference may be made, as a matter of history of legislation, to the draft bills of 1891, 1897 and 1898, prepared under legislative authority of the several States: *Tasmania v. The Commonwealth*, (1903-4) 1



C.L.R., 331. Individual opinions of members of the Federal convention expressed in debate cannot be referred to for the purpose of construing the Constitution: *Municipal Council of Sydney v. The Commonwealth*, (1903-4) 1 C.L.R., 208.

“ In regarding the birth of a new State we are not obliged to limit our view to the cradle. In fashioning the Constitution of a Federated Commonwealth the framers might assuredly be expected to consider the Constitution and history of other federations, old and new. According to the recognized canons of construction they must be taken to have been familiar with them, and the application of this doctrine is not excluded or weakened by its notorious historical truth as to the members of the Convention. Now, at the end of the nineteenth century there were in actual operation three great federal systems of Government—the two great English-speaking federations of the United States of America and Canada, and the Swiss Confederation. We may assume that the relative advantages and disadvantages of these several systems were weighed by the framers of the Constitution. If it is suggested that the Constitution is to be construed merely by the aid of a dictionary, as by an astral intelligence, and as a mere decree of the Imperial Parliament without reference to history, we answer that that argument, if relevant, is negated by the preamble to the Act itself, which has been already quoted. That is to say, the Imperial Legislature expressly declares that the Constitution has been framed and agreed to by the people of the Colonies mentioned, who, as pointed out in the judgment of the Board in *Webb v. Outtrim*, (1907) A.C., 81, had practically unlimited powers of self-government through their Legislatures. How, then, can the facts known by all to have been present to the minds of the parties to the agreement be left out of consideration ” ? *Per GRIFFITH, C.J. in Baxter v. Commissioner of Taxation*, (1907) 4 C.L.R., at p. 1109.

#### **Reference to Future Relations and Changing Conditions.**

At the same time it must be remembered that the Constitution was intended to regulate the future relations of the Federal and State Governments, not only with regard to then existing circumstances, but also with regard to such changed conditions as the progress of events might bring about: *Pensacola Telegraph Co. v. Western Union Telegraph Co.*, (1877) 96 U.S., 1; *Federated Amalgamated Government Railway and Tramway Service Association v.*

*New South Wales Railway Traffic Employees' Association*, (1906) 4 C.L.R., at p. 534.

#### **Reference to Existing Laws, Facts and Circumstances.**

The Constitution Act is not only an Act of the Imperial Legislature, but it embodies a compact entered into between the six Australian Colonies which formed the Commonwealth. This is recited in the preamble to the Act itself. The rules, therefore, that in construing a Statute regard must be had to the existing laws which are modified by it, and that in construing a contract regard must be had to the facts and circumstances existing at the date of the contract are applicable in an especial degree to the construction of such a Constitution : *Federated Amalgamated Government Railway and Tramway Service Case*, (1906) 4 C.L.R., 534.

#### **Reference of Constitution to Electors.**

Another circumstance which, is to be regarded is that the Constitution as framed was to be, and was, submitted to the votes of the electors of the States. It ought, therefore, to be held, *prima facie*, that, when a particular subject-matter relating to the respective powers of the States and the Commonwealth was specifically dealt with, it was intended to invite the attention of the electors specifically to that subject-matter and to the proposed manner of dealing with it : *Federated Amalgamated Government Railway and Tramway Service Case*, 4 C.L.R., at p. 534.

#### **Purpose and Scheme.**

The purpose of the Australian Constitution was the creation of a new State, the Commonwealth, intended to take its place among the free nations of the world, with all such attributes of sovereignty as were consistent with its being still under the Crown : *Per* GRIFFITH, C.J. in *Baxter v. Commissioner of Taxation, New South Wales*, (1907) 4 C.L.R., at p. 1121.

The scheme of the Constitution was in this respect practically identical with that of the Constitution of the United States of America, which had been interpreted by the Supreme Court of that Republic in a long series of cases familiar to the Australian publicists by whom the Australian Constitution was framed. Hence, it ought to be inferred that the intention of the framers was that like provisions should receive like interpretation. This is a well-recognized

rule of construction and its application is not limited to Statutes of the same Legislature : *Ib.* 4 C.L.R., at p. 1122.

“ We cannot disregard the fact that the Constitution was framed by a Convention of Representatives from the several Colonies. We think that sitting here, we are entitled to assume—what, after all, is a fact of public notoriety—that some, if not all, of the framers of the Australian Constitution were acquainted with not only the Constitution of the United States, but with that of the Canadian Dominion and those of the British Colonies ” : *Per* GRIFFITH, C.J. in *D'Emden v. Pedder*, (1903) 1 C.L.R., at p. 113.

“ When a particular form of legislative enactment which has received authoritative interpretation, whether by judicial decisions or by long course of practice is adopted in the framing of the later Statute, it is a sound rule of construction to hold that the words so adopted were intended by the Legislature to bear the meaning which has been so put upon them ” : *Per* GRIFFITH, C.J. in *D'Emden v. Pedder*, (1903) 1 C.L.R., at p. 110. “ When, therefore, under these circumstances, we find embodied in the Constitution provisions undistinguishable in substance though varied in form from the provisions of the Constitution of the United States which had long since been judicially interpreted by the Supreme Court of that Republic, it is not an unreasonable inference that its framers intended that like provisions should receive like interpretation ” : *Per* GRIFFITH, C.J. in *D'Emden v. Pedder*, (1903) 1 C.L.R., at p. 113.

It is a matter of common knowledge that the framers of the Australian Constitution were familiar with the two great examples of English-speaking federations and deliberately adopted, with regard to the distribution of powers, the model of the United States in preference to that of the Canadian Dominion : *Per* GRIFFITH, C.J. in *Deakin v. Webb*, (1903) 1 C.L.R., at p. 606.

The Constitution Act is not only an act of the Imperial Legislature, but it embodies a compact entered into between the six Australian Colonies which formed the Commonwealth. This is recited in the preamble to the Act itself. The rules, therefore, that in construing the Statute regard must be had to the existing laws which are modified by it, and that in construing a contract regard must be had to the facts and circumstances existing at the date of the contract, are applicable in an especial degree to the construction of such a Constitution : *Per* GRIFFITH, C.J. in the *Federated*

*Amalgamated Government Railway and Tramway Service Association v. New South Wales Railway and Traffic Employees' Association*, (1906) 4 C.L.R., at p. 534.

At the same time it must be remembered that the Constitution was intended to regulate the future relations of the Federal and State Governments, not only with regard to then existing circumstances, but also with regard to such changed conditions as the progress of events might bring about: *Pensacola Telegraph Co. v. Western Union Telegraph Co.*, (1877) 96 U.S., at p. 1.

In considering the respective powers of the Commonwealth and of the States it is essential to bear in mind that each is, within the ambit of its authority, a Sovereign State, subject only to the restrictions imposed by the Imperial connection and to the provisions of the Constitution, either expressly or necessarily implied: *D'Emden v. Pedder*, 1 C.L.R., at p. 109.

It is manifest from the whole scope of the Constitution that, just as the Commonwealth and States are regarded as distinct and separate Sovereign bodies with sovereign powers limited only by the ambit of their authority under the Constitution, so the Crown, as representing those several bodies is to be regarded not as one, but as several juristic persons, to use a phrase which well expresses the idea: *The Municipal Council of Sydney v. The Commonwealth*, (1903) 1 C.L.R., at p. 231.

The Federal Constitution in its very nature pre-supposes the separate and independent existence of the King as representing the community in each State and in the Commonwealth respectively, the King in that representative capacity as head of the Executive being in a position in each case to assert and maintain the rights of the political entity he represents: *Per O'CONNOR, J. in The King v. Sutton*, (1907-8) 5 C.L.R., at p. 805.

The main purpose of the Constitution is the distribution between the Commonwealth and the States of all the governmental powers of the people of Australia. The States in the exercise of the powers exclusively reserved to them are confined, as before Federation, within the jurisdiction of their territorial limits. But in the exercise of the exclusive powers of the Commonwealth, State boundaries disappear, and the whole of Australia becomes one territory: *Per O'CONNOR, J. in The King v. Sutton*, (1907-8) 5 C.L.R., at p. 807.

### **The Federal Principle of the Constitution.**

The Federal principle of the Constitution of the Commonwealth has been, ever since convention times, firmly insisted upon by its framers. It has been recognized in several majority judgments delivered by the High Court. Further it has been contended that this Constitution presents a closer approximation to the true Federal model than that of the Dominion of Canada. Pronounced and high support for these views is voiced in the recent judgment of the Privy Council in the case of the *Attorney-General of the Commonwealth v. Colonial Sugar Refining Co.*, (1913) 17 C.L.R., 644:

"About the fundamental principle of the Australian Constitution," said Lord HALDANE, H.C., "there can be no doubt. It is Federal in the strict sense of the term, as a reference to what was established on a different footing in Canada shows. The British North America Act of 1867 commences with the preamble that the then provinces had expressed their desire to be federally united into one dominion, with a constitution similar in principle to that of the United Kingdom. In a loose sense the word 'federal' may be used, as it is there used, to describe any arrangement under which self-contained States agree to delegate their powers to a common Government, with a view to entirely new constitutions even of the States themselves. But the natural and literal interpretation of the word confines its application to cases in which these States, while agreeing on a measure of delegation, yet in the main continue to preserve their original constitutions."

"The Canadian Constitution," said Lord HALDANE, "therefore, departs widely from the true Federal model adopted in the Constitution of the United States, the tenth amendment to which declares that the powers not delegated to the United States by the Constitution nor prohibited by it to the States are reserved to the States respectively or to their people. Of the Canadian Constitution the true view appears, therefore to be that, although it was founded on the Quebec resolutions, and so must be accepted as a treaty of union among the then Provinces, yet when once enacted by the Imperial Parliament it constituted a fresh departure, and established new Dominion and Provincial Governments, with defined powers and duties, both derived from the Act of the Imperial Parliament which was their legal source."

"In fashioning the Constitution of the Commonwealth of Australia," continued the Lord Chancellor, "the principle established by the United States was adopted in preference to that chosen by Canada. It is a matter of historical knowledge that in Australia the work of fashioning the future Constitution was one which occupied years of preparation through the medium of conventions in which the most distinguished statesmen of Australia took part. Alternative systems were discussed and weighed against each other with minute care. The Act of 1900 must accordingly be regarded as an instrument which was fashioned with great deliberation, and if there is at points obscurity in its language, this may be taken to be due not to any uncertainty as to the adoption of the stricter form of Federal principle, but to that difficulty in obtaining ready agreement about phrases which attends the drafting of legislative measures by large assemblies": (1914) App. Cas., p. 237.

#### Grants of Legislative Powers.

The general legislative powers of the Commonwealth are delimited by the Constitution, sections 51 and 52. In other parts of the instrument there are sections authorizing legislation respecting the political, judicial and administrative and territorial organization of the Commonwealth. It is in these two sections that the grants of power to legislate for the peace, order and good government of the Commonwealth are to be found. Some of the grants are framed under general terms without any apparent limitation, restriction or reservation to cut down their generality; others are coupled with direct limitations or prohibitions either associated with the grant or to be found elsewhere in the document. All grants are also subject to certain constitutional declarations and reservations. Where there is a grant without restriction of subject-matter or area the maxim *quando lex aliquid concedit concedere et illud sine quo res ipsa valere non potest*, may be appropriately resorted to in aid of its interpretation.

In other words, where any power or control is expressly granted there is included in the grant, to the full extent of the capacity of the grantor and without special mention, every power and every control the denial of which would render the grant itself ineffective. This is, in truth, not a doctrine of any special system of law, but a statement of a necessary rule of construction of all grants of power, whether

by an unwritten constitution formal, written instrument or other delegation of authority, and apply from the necessity of the case, to all to whom is committed the exercise of powers of Government : *Per GRIFFITH, C.J. in D'Emden v. Pedder*, (1903) 1 C.L.R., at p. 109.

This is a maxim which is applied to the construction of all grants of power, from the highest to the lowest ; it follows that a grant of sovereign powers includes a grant of a right to disregard and treat as inoperative any attempt by any other authority to control their exercise. A remarkable illustration of the application of this maxim is afforded by the very recent case of *Attorney-General of Canada v. Cain and Gilhula*, (1906) A.C., 542, where it was held that the doctrine might be applied so as to warrant the exercise of State powers even beyond territorial limits : *Per GRIFFITH, C.J. : Baxter v. Commissioner of Taxation (N.S.W.)*, (1907) 4 C.L.R., 1121-22.

#### Limits of Legislative Powers.

The powers of the Federal Legislature are limited and the limits are not to be transcended. But a sound construction of the Constitution must allow to the national Legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the Constitution, are constitutional : *Per MARSHALL, C.J. in M' Culloch v. Maryland*, (1819) 4 Wheat., at p. 421.

Where the law in question is not prohibited, and is really calculated to effect any of the objects entrusted to the Government, to undertake here to inquire into the degree of its necessity, would be to pass the line which circumscribes the judicial department, and to tread on legislative ground : *M' Culloch v. Maryland*, 4 Wheat., at p. 423.

X The power of the Federal Parliament in reference to external and inter-state trade is supreme over the whole subject unimpeded and unembarrassed by State lines or State laws ; in this matter, the country is one and the work to be accomplished is national ; State interests, State jealousies and State prejudices do not require

to be consulted. In matters of external and inter-state commerce there are no States. Thayer Weld's *Cases on Constitutional Law*, p. 2068.

So long as the legislative power is kept within its ambit, that is, so long as the Federal grantee does not attempt to regulate the purely internal and domestic commerce of a State, such exercise and its executive consequences cannot be hindered or nullified in any part by any legislative or executive act on the part of a State. A Statute of a State would be void so far as it purported to authorize such an act; and there is no constitutional authority in the Executive of the State to do that which no Statute of its Parliament could make lawful. It follows that in such a case no citizen can justify under an authority purporting to be granted by a State Executive, for that is no authority at all: *Per* BARTON, J. in *The King v. Sutton*, (1908) 5 C.L.R., at p. 802.

### Implied Grants.

The grant of power to legislate concerning a definite subject-matter such as aliens or immigration or the people of any race necessarily carries with it a grant of all proper means not expressly prohibited to effectuate the power. No instance of this principle could be stronger than that of the *Attorney-General for Canada v. Cain and Gilhula*, (1906) A.C., 542, where the Privy Council held that the legislative power to exclude aliens connoted the power to expel as a necessary complement of the power of exclusion. But that was because the power of exclusion could not otherwise even within its own admitted limits be effectually exercised and enforced. This decision was followed by the High Court of Australia in *Robtelmes v. Brennan*, (1906) 4 C.L.R., 395, in which it was held that the Pacific Labourers Act 1901, section 8, authorizing the deportation from Australia of persons within the meaning of that Act even to the extent of extra-territorial restraint and imprisonment on board ships during deportation was a valid exercise of Commonwealth power. But the case is quite different when it is found that a given power, though fully and completely exercised and enforced, is not effectual to attain all the results desired or expected. The matter is then one for the consideration of the authority in whom resides the right of granting a power more extensive. It is not open to the grantee of the power actually bestowed to add to its efficacy, as it is called, by some further means outside the limits of the power



conferred, for the purpose of more effectively coping with the evils intended to be met : *Per ISAACS, J.*, in *The Australian Boot Trade Employees' Federation v. Whybrow & Co.*, (1910) 11 C.L.R., at p. 338.

A grant of power to settle inter-state industrial disputes by compulsory arbitration necessarily implies a power in the Parliament to pass a law prohibiting and penalizing strikes : *Stemp v. The Australian Glass Manufacturing Co. Ltd.*, (1917) 23 C.L.R., 226 ; 23 A.L.R., 273.

### **Limitations.**

A limitation is where a grant is coupled with words restricting the subject-matter or its sphere of operation. Thus the legislative power of trade and commerce (Constitution, section 51 (I.)) is qualified by the words "with other countries and among States." The power to grant bounties is qualified by the requirements of uniformity throughout the Commonwealth : section 51 (III.).

### **Implied Limitation of Grants.**

The express grant of a legislative power framed in apparently general terms may be limited by express words associated with it or necessary implications to be found in or arising from other parts of the Constitution and the general scheme of Government. A conspicuous illustration of this principle is found in the leading case of *Huddart Parker Proprietary Ltd. v. Moorehead*, (1908) 8 C.L.R., 331, decided on the construction of the Constitution, section 51 (xx.). That sub-section purports to enable the Federal Parliament to legislate concerning foreign and other corporations. If these words stood unqualified and were construed literally it was not disputed that they might authorize Federal Legislation respecting the governance and control of State corporations when lawfully engaged in domestic trade commerce and industries within a State ; including the creation of corporations their contractual relations and their labour and employment conditions and obligations within a State, in fact literally construed the words would authorize the Federal Parliament to pass a code of laws specially applicable to corporations and to corporations only in and throughout Australia. The majority of the High Court denied the validity of such contention and held that the Constitution is to be construed as if it contained an express declaration that power to make laws with respect to trade and commerce within the limits of a State, and not relating to trade and commerce with other countries or

among the States, is reserved to the States except so far as the exercise of that power by the Commonwealth is necessary for or incidental to the execution of some other power conferred on the Parliament : 8 C.L.R., at p. 352.

### **Declarations of Rights.**

In several sections of the Constitution there are declarations of rights, privileges and liberties which cannot be taken away or impaired by either State or Federal legislation. By covering clause V. all Commonwealth laws are declared to be in operation on certain British ships whilst sailing on the high seas. This clause being in the Imperial Act but not in the Constitution, is unalterable and beyond the amending power. They are words granting the extension of area of operations without any enlargement of the subject-matter. By section 92 of the Constitution it is declared that trade commerce and intercourse between the States, after the adoption of uniform tariff, shall be absolutely free. The right of trial by jury on indictment of any offence against any law of the Commonwealth is secured by section 80. By section 117 British subjects being residents of any State may not be liable by the law of any other State to any disability or discrimination which are not equally applicable to British subjects residents in such other States. State constitutions, powers and State laws are, subject to the Constitution, preserved by sections 106, 107 and 108. These provisions are beyond the reach of the legislative power but may be altered or abolished by the amending power.

### **The Police Powers of States.**

There is no generally accepted doctrine that the Federal power is in all cases subject to any reservation of the State police power. If that were so Congress would have no right to legislate so as to prevent the exercise of the State power assumed to be "reserved." In *Kellar v. United States*, 213 U.S., 146, the Supreme Court made some quotations from previous cases which are exactly in line with the canons of construction laid down by the Privy Council in the Canadian cases. "Generally it may be said in respect to laws of this character that, though resting on the police power of the State, they must yield whenever Congress, in the exercise of the power granted to it legislate upon the precise subject-matter, for that power like all the other reserved powers of the States, is subordinate to those conferred by the Constitution upon the nation."

“ Definitions of the police power must, however, be taken subject to the conditions that the State cannot, in its exercise for any purpose whatever encroach upon the powers of the general Government or rights granted or secured by the supreme law of the land ” : *Per ISAACS, J. in The King v. Smülers ; Ex parte Benson*, (1912) 16 C.L.R., at p. 115.

### Prohibitions or Denials of Power.

In the American as well as the Australian Constitutions there are certain express prohibitions applicable to the Union as well as to the States. Among the prohibitions contained in the Australian Constitution are those embodied in the following sections :—

Sec. 51.—The Commonwealth shall not, in taxation, discriminate between States.

Sec. 99.—The Commonwealth shall not give preference to one State over any other State in any regulations relating to trade and commerce.

Sec. 100.—The Commonwealth shall not abridge the rights of States or the residents of States to the reasonable use of waters and rivers for conservation or irrigation.

Sec. 114.—The Commonwealth shall not tax the property of any State.

Sec. 115.—The Commonwealth shall not establish any religion or religious test.

The following prohibitions are applicable to States, viz. :—

Sec. 114.—A State shall not without the consent of the Parliament of the Commonwealth raise or maintain any naval or military force or impose a tax on property of any kind belonging to the Commonwealth.

Sec. 115.—A State shall not coin money nor make anything but gold and silver a legal tender.

### Constructive Prohibitions.

In addition to express grants, reservations and denials of powers which appear on the face of the American and the Australian Constitutions, it has been held that there are necessary implications to be read into the instrument amounting to constructive limitations or prohibitions.

Thus although the States are not expressly forbidden to tax Federal governmental agencies and instrumentalities the Supreme Court of United States have decided in several great and memorable cases beginning with *M' Culloch v. Maryland*, (1819) 4 Wheat., 316, that a State has no right to tax any of the constitutional means employed by the Government of the Union to execute its constitutional powers or by taxation or otherwise to retard, impede, burden or in any manner control the operations of the laws passed by Congress to carry into effect the powers vested in the national Government.

The converse of this rule which was founded on the doctrine of necessary implication or implied prohibition was laid down in *Collector v. Day* (1870) 11 Wall. U.S., 113, in which it was decided by the Supreme Court that the general principles of the Constitution forbid Congress from taxing the salaries of State officers and the revenues of municipal corporations.

Other American examples of the implied denial of powers may be mentioned.

### **Implied Prohibition.**

The express power of Congress to regulate commerce with foreign nations and among the several States has been always understood as limited by its terms as a virtual denial of power to interfere in the internal trade and business of the separate States except indeed as may be necessary and proper for carrying into execution some other power granted or vested in the Union: *Per CHASE, C.J. in United States v. De Witt*, 9 Wall., at p. 43. In that case the Federal Act purported to prohibit the mixing of naphtha and illuminating oils and the selling of such a mixture; it created an obligation on the subject of illuminating oils, and thus interfered with the internal concerns of each State. It was held to be *ultra vires*, being an invasion of the rights and powers of the States.

In the interpretation of the Constitution of the Commonwealth the High Court of Australia has followed the American precedents in deciding the cases of *D' Emden v. Pedder*, 1 C.L.R., at p. 91; *Deakin v. Webb*, 1 C.L.R., 585 and *Baxter v. Commissioner of Taxation of New South Wales*, 4 C.L.R., 1087, in which it was held that States cannot tax or burden the Federal income of Federal officers earned within the States. The natural converse of that rule was

applied in the *Federated Amalgamated Government Railway and Tramway Service Association v. New South Wales Railway Traffic Employees' Association*, (1906) 4 C.L.R., at p. 488, in which the High Court held that State railways were not subject to Commonwealth industrial awards.

The converse of the rule laid down in *D'Emden v. Pedder*, (1903) 1 C.L.R., at p. 111, has been understood to apply for the protection of the States. It is a canon of construction, and is merely an application of a general rule applicable to the construction of all contracts. It is sometimes called the doctrine of implied covenants or stipulations that is, stipulations which upon the construction of the whole instrument appear to have been necessarily intended by the parties. In order that the doctrine may be applied it must appear clearly that the implied obligation or restriction set up must have been intended by the parties to the compact: *Per* GRIFFITH, C.J. in the *Attorney-General for Queensland v. The Attorney-General for the Commonwealth*, (1915) 20 C.L.R., at p. 163.

#### **Doctrine of Silent Prohibition and its Limits.**

It has long been a judicial doctrine of the Supreme Court of the United States which has passed into a definite canon of constitutional construction that the trade and commerce power being national is in its nature, exclusive; and that consequently the silence of Congress is equivalent to the positive declaration of freedom. The cases show that a qualification is grafted on to that doctrine of silent prohibition namely that constructive prohibition does not go so far as to forbid the States from passing health and quarantine and other domestic and local laws, and if they do merely that, they are not in conflict with the Constitution simply because there is some incidental interference with inter-state commerce: *Martin v. West*, 222 U.S., 191, at p. 198; *The King v. Smithers*; *Ex parte Benson*, (1912) 16 C.L.R., at p. 114; *Campagne Francaise Co. v. Board of Health*, 186 U.S., at p. 391.

#### **Limits of Rule.**

In the Federal Land Tax Case the validity of that tax was impeached on the ground that the inclusion of Crown leases and particularly future Crown leases, is contrary to an implied prohibition of the Federal Constitution by which the power of Federal taxation is forbidden so far as it extends to interfere with State functions and instrumentalities.

“The scheme of the Constitution,” said ISAACS, J. “was to transfer and grant certain powers to the Commonwealth, and, subject to that transfer and grant, to leave the State powers untouched, except where expressly excluded. The effect of the scheme is therefore satisfied by pointing to the express power of taxation; and apart from express limitations which of course include whatever is necessarily implied from the words used when they are properly construed, the language of that power must in accordance with the principle so clearly stated by Lord HALDANE in the *Colonial Sugar Refining Co. Case*, (1914) A.C., 237, be given its full natural meaning as applied to a representative Legislature. When that point is reached, it is no answer to say that there is an implied prohibition, somewhere in the structure of the Constitution, not contained in any word or phrase and not deducible by means of any principle of construction or interpretation by which words of general import are cut down by reference to their subject-matter: see *Webb v. Outtrim*, (1907) A.C., 81 at p. 91: *Per* ISAACS, J. in the *Attorney-General for Queensland v. The Attorney-General for the Commonwealth*, (1915) 20 C.L.R., at p. 171.

In covering clause V. of the Constitution Act, that Act (which includes the Constitution) and all Commonwealth laws made under it are declared to be binding on the Courts, Judges and people of every State and of every part of the Commonwealth, notwithstanding anything in the laws of any State. In other words, there is no law possible which a State may pass which can affect the validity and binding force of a Commonwealth law supported by the Constitution. How, then, can it be said that a Commonwealth taxing law must be invalid if it conflicts with a State law, actual or potential, on the subject of Crown lands: *Per* ISAACS, J., 20 C.L.R., at p. 172.

### Concurrent State and Federal Powers.

It is essential to the attribute of sovereignty of any Government that it shall not be interfered with by any external power. The only interference, therefore, to be permitted is that prescribed by the Constitution itself. A similar consequence follows with respect to the constituent States. In their case, however, the Commonwealth is empowered to interfere in certain prescribed cases. But under the scheme of the Constitution there is a large number of subjects upon which the legislative powers of both the Common-

wealth and the State may be concurrently exercised. In such a state of things it is not only probable, but, as shown by the experience of the United States under a similar distribution of the powers, certain, that questions will constantly arise as to the operation of laws which, although unobjectionable in form and *prima facie* within the competence of the Legislature which enacted them, would, if literal effects were given to them interfere with the exercise of the sovereign powers of the other of the two sovereign authorities concerned : *Per* GRIFFITH, C.J. in *Baxter v. Commissioner of Taxation, New South Wales*, (1907) 4 C.L.R., at p. 1121.

### Canons of Construction.

The powers of the Federal Government are limited and its limits are not to be transcended. But a sound construction of the Constitution must allow to the national Legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional : *Per* MARSHALL, C.J. in *M' Culloch v. Maryland*, 4 Wheat., at p. 421.

“ Congress must possess the choice of means, and must be empowered to use any means which are in fact conducive to the exercise of a power granted by the Constitution ” : *Per* MARSHALL, C.J. in the *United States v. Fisher*, 2 Cranch., at p. 396.

In a dual system of government there are certain matters over which the national government has absolute control, and no action of the State can interfere therewith, and there are others in which the State is supreme, and in respect to them the national government is powerless : *Per* BREWER, J. in *South Carolina v. United States*, 199 U.S., at p. 448.

It is a sound principle of construction that Acts of a sovereign Legislature and, indeed, of subordinate Legislatures, such as a municipal authority, should, if possible, receive such an interpretation as will make them operative and not inoperative : *Per* GRIFFITH, C.J. in *D' Emden v. Pedder*, 1 C.L.R., at p. 119.

"There seems to be nothing in the Constitution itself to indicate that the power conferred was intended to cover part only of the evils aimed at. The words used are large enough to cover all of them and where it becomes a question of construing words used in conferring a power of that kind on the Commonwealth Parliament, it must always be remembered that we are interpreting a Constitution broad and general in its terms intended to apply to the varying conditions which the development of our community must involve. It would be hard to improve on the above rule": *Per* O'CONNOR, J. in the *Jumbunna Coal Mine Case*, (1908) 6 C.L.R., at pp. 367-8.

"The most important duty imposed on this Court is that of interpreting the Constitution; and I think some very important rules of interpretation have been laid down or accepted by members of this Court, which ought to guide us in considering whether the portion of the Act in question, the organization, and the subject-matter are within the Constitution": *Per* POWERS, J. in the *Australian Tramway Employees' Association v. Prahran and Malvern Tramway Trust*, (1913) 17 C.L.R., at p. 710.

In a Canadian Constitutional case the judgment of the Privy Council stated that it could not be too strongly put that with the wisdom or expediency or policy of an Act, lawfully passed no Court has a word to say. All, therefore, that their Lordships could consider in the argument under review was whether it took them a step towards proving that this Act, a law relating to marriage was outside the authority of the Canadian Parliament, which is purely a question of the constitutional law of Canada: *Per* Lord LOREBURN, L.C. (Privy Council) in *The Attorney-General for Ontario v. The Attorney-General for Canada*, (1912) A.C., 571.

In the interpretation of a completely self-governing Constitution founded upon a written organic instrument, such as the British North America Act and the Constitution of the Commonwealth of Australia if the text is explicit it is conclusive alike in what it directs and what it forbids. When the text is ambiguous, as, for example, when words establishing two mutually exclusive jurisdictions are wide enough to bring a particular power within either, recourse must be had to the context and scheme of the Act. Again, if the text says nothing expressly then it is not to be presumed that the



Constitution withholds the power altogether. On the contrary it is to be taken for granted that the power is bestowed in some quarter unless it is extraneous to the Statute itself (as for example a power to make laws for some part of His Majesty's Dominions outside of Canada or Australia) or otherwise, is clearly repugnant to its sense. For whatever belongs to self-government in Canada or in Australia belongs either to the Dominion or the Provinces in one country, to the Commonwealth or the States in the other. It certainly would not be sufficient to say that the exercise of the power might be oppressive, because that result might ensue from abuse of a great number of powers indispensable to self-government.: *Per* Lord LOREBURN, L.C. (Privy Council) in *The Attorney-General for Ontario v. The Attorney-General for Canada*, (1912) A.C., p. 583.

This pronouncement of the Privy Council in favour of the broad construction of a written instrument of Government is a valuable addition to the canons of constitutional interpretation on the subject of incidental powers ; it, in effect, sums up, the fully reasoned opinions of MARSHALL, C.J. in *M'Culloch v. Maryland*, 4 Wheat., 316, at p.p 406-411. : *Per* ISAACS, J. in the *Colonial Sugar Refining Co. Ltd. v. Attorney-General for the Commonwealth*, (1912) 15 C.L.R., at p: 215.

The rule as to implied prohibition laid down in *D'Emden v. Pedder*, 1 C.L.R., at p. 101, and conversely applied, to the case of interference by the Commonwealth with State instrumentalities, in the *Federated Amalgamated Government Railway and Tramway Service Association v. New South Wales Railway Traffic Employees' Association*, 4 C.L.R., 488, has no application to powers which are conferred upon the Commonwealth in express terms and which by their nature manifestly involve control of some of the legislative powers and activities of the State Government, such as the power to make laws with respect to trade and commerce with other countries and with respect to taxation.: *The Attorney-General of New South Wales v. Collector of Customs for New South Wales*, (1908) 5 C.L.R., at p. 818. With respect, however, to matters within the exclusive competence of the Federal Parliament no question of conflict of Federal and State powers can arise, inasmuch as from the point at which the quality of exclusiveness attaches to the Federal power the competency of the States is altogether extinguished : *D'Emden v. Pedder*, 1 C.L.R., at p. 111.

The only way in which the Courts of justice can ascertain whether a Statute violates a written Constitution is by looking to the terms of the instrument by which affirmatively the legislative powers were created and by which negatively they are restricted. If what has been done is legislation within the general scope of the affirmative words which give the power and if it violates no express condition or restriction by which that power is limited it is not for any Court of justice to inquire further or to enlarge constructively those conditions and restrictions: *Per* Lord SELBOURNE (Privy Council) in *The Queen v. Burah*, 3 A.C., pp. 904-5.

“That,” said ISAACS. J. in *Osborne v. The Commonwealth*, (1911) 12 C.L.R., at p. 360 “is the golden rule of constitutional interpretation; it is not merely a specific instance of the ordinary rules of statutory interpretation, but an authoritative canon of construction specially applied by His Majesty in Council to Imperial grants of Constitutions to Dependencies, and as such must be taken to have guided the Imperial Parliament in passing our own Constitution.”

A Federal Act must be construed as intended to apply only to matters within the ambit of the Federal power: *Per* GRIFFITH, C.J. in the *Colonial Sugar Refining Company v. The Attorney-General for the Commonwealth*, (1912) 15 C.L.R., at p. 195.

Where the question is whether the Constitution has used an expression in a wider or narrower sense, the Court should always lean to the broader interpretation unless there is something in the context or in the rest of the Constitution to indicate that the narrower interpretation will best carry out its object and purpose: *Per* O’CONNOR, J. in the *Jumbunna Coal Mine Case*, (1908) 6 C.L.R., at p. 368.

### Common Law Maxims.

The common law maxim *quando lex aliquid concedit* is as applicable to the construction of the Constitution of the Commonwealth as it has been held to be applicable to other grants of constitutional power. In other words, where any power or control is expressly granted, there is included in the grant, to the full extent of the capacity of the grantor, and without special mention, every power and every control the denial of which would render the grant itself ineffective. This is, in truth, not a doctrine of any special

system of law, but a statement of a necessary rule of construction of all grants of power, whether by unwritten constitution, formal written instrument, or other delegation of authority, and applies from the necessity of the case to all to whom is committed the exercise of powers of government: *D'Emden v. Pedder*, 1 C.L.R., p. 109.

As the Constitution contains an allotment of enumerated powers coupled with limitations and prohibitions it follows that the rules of construction expressed in the maxims *expressum facit cessare tacitum* and *expressio unius est exclusio alterius* are applicable in a greater, rather than in a less degree, than in the construction of ordinary contracts or ordinary Statutes: *Federated Amalgamated Government Railway and Tramway Service Case*, (1906) 4 C.L.R., at p. 534.

In the case of *Webb v. Outtrim*, (1907) A.C., 81, the Privy Council held that the express prohibitions contained in the Constitution of the Commonwealth would according to the maxim *expressum facit cessare tacitum* negative the existence of implied prohibitions. Referring to this expression of opinion by the Privy Council, the Chief Justice (Sir SAMUEL GRIFFITH) said:—"The rule of implied prohibition laid down in *M'Culloch v. Maryland*, 4 Wheat., 316, was an accepted part of the constitutional law of the United States, but it was held that it did not extend to prohibit the taxation of Federal property or State property in all cases. A distinction has been drawn, and is still accepted in the United States, between property held as an instrumentality of Government and property held by the Commonwealth or a State in the carrying on of an ordinary business or as an investment. See the cases cited in *South Carolina v. United States*, 199 U.S., 437; see also *Fort Leavenworth Railroad Co. v. Lowe*, 114 U.S., 525, at pp. 531-9: Per GRIFFITH, C.J. in *Baxter v. Commissioner of Taxation. New South Wales*, (1907) 4 C.L.R., at p. 1127.

With regard to the application of the maxim *expressum facit cessare tacitum* it may be pointed out in the first place that all the express prohibitions in the Australian Constitution on which reliance is or can be placed, with one exception, find their counterpart in the Constitution of the United States. The maxim *expressum facit cessare tacitum* cannot be used to exclude other prohibitions which may arise from necessary implication, for instance section 114 was

not formed for the purpose of exhaustively defining prohibitions ; it was inserted altogether *alio intuitu* : *Per* GRIFFITH, C.J., in *Baxter v. Commissioner of Taxation*, (1907) 4 C.L.R., at p. 1126.

The American, as well as the Australian Constitution, contains express prohibitions, but it was never held that they precluded the admission of those necessary implications which are admitted in all other cases : *Per* GRIFFITH, C.J. in *Baxter v. Commissioner of Taxation*, (1907) 4 C.L.R., at p. 1128.

The Constitution contains several express prohibitions such as section 114, but those are not exhaustive. The maxim *expressum facit cessare tacitum* has been often invoked in vain in English Courts. See, for instance, *Colquhoun v. Brooks*, 21 Q.B.D., 52, at p. 65, where LOPES, L.J. called it " a valuable servant, but a dangerous master " : *Per* GRIFFITH, C.J. in *Baxter v. Commissioner of Taxation*, (1907) 4 C.L.R., 1128.

#### **Preference of Workable Interpretation.**

It is a sound principle of construction that Acts of a sovereign legislature, and, indeed, of subordinate legislatures such as a municipal authority ; should, if possible, receive such an interpretation as will make them operative and not inoperative : *D'Emden v. Pedder*, 1 C.L.R., at p. 119.

#### **General Words with Restricted Meaning.**

It is a settled rule in the interpretation of Statutes that general words will be taken to have been used in the wider or in the more restricted sense according to the general scope and object of the enactment (*Hardcastle*, pp. 193-4). For instance, it will be taken that general words are not to be applied extra-territorially. It will also be presumed that Parliament did not intend to interfere with international usage, and therefore, unless express words are used, an English Statute will not be held applicable to a foreigner residing out of England : *D'Emden v. Pedder*, (1903-4) 1 C.L.R., at p. 119.

#### **Similar Provisions in other Constitutions.**

In interpreting the Commonwealth Constitution, it is reasonable to infer that where the framers of that instrument inserted provisions undistinguishable in substance, though varied in form, from the provisions of other legislative enactments which have

received judicial interpretation, they intended that such provisions should receive the like interpretation : *D'Emden v. Pedder*, (1903-4) 1 C.L.R., at p. 113.

#### **State Act not Assumed to be in Conflict with Constitution.**

General words in a State Act should, if possible, be so construed that the application of the Act will not infringe the Commonwealth Constitution : *D'Emden v. Pedder*, (1903-4) 1 C.L.R., at p. 120.

#### **Interpretation of State Laws.**

The High Court will be reluctant, as a general rule, to put a different construction upon the Statutes of a State from that which the Supreme Court of the State itself has declared to be their true construction ; at any rate unless its decision is directly invited by way of appeal, either from the same Court or from the Court of another State in a case involving the construction of identical words : *Bond v. Commonwealth of Australia*, (1903-4) 1 C.L.R., at p. 23.

#### **Substance of Law rather than Form Regarded.**

In the case of *Attorney-General for Quebec v. Queen Insurance Co.*, (1877) 3 App. Cas., 1090, it was held by the Privy Council that a Statute of the Province of Quebec although in form it purported to be an exercise of the power of direct taxation possessed by the provincial Legislature, it was in substance an attempted exercise of the power of indirect taxation, which was within the exclusive domain of the Dominion Legislature. The case of *Russell v. The Queen*, (1882) 7 App. Cas., 839, raised a similar question.

#### **Pith and Substance of Laws.**

In interpreting the grant of legislative power the Court will have regard to the real design and purpose or the pith and substance of the legislation in question rather than its form : *Per Lord WATSON* in the *Union Colliery Co. of British Columbia v. Bryden*, (1899) A.C., at p. 587.

The true rule of construction to be observed in determining whether a particular law is or is not within the power of the Federal or State Parliament is, according to the opinion of the High Court in *The King v. Barger*, that regard must be had to the substance of the legislation rather than to its literal form : *The King v. Barger*, (1908) 6 C.L.R., 72.

The Court will have regard to the substance of an enactment and is not confined to its mere form. It is sufficient to mention the *Union Colliery Co. v. Bryden*, (1899) A.C., 580 ; *Barger's Case*, (1908) 6 C.L.R., 41, and the very recent case of *John Deere Plow Co. Ltd. v. Wharton*, (1915) A.C., 330, in which the Lord Chancellor HALDANE, delivering the judgment of the Judicial Committee, pointed out that, although provisions similar to those of the provincial Act then attacked might, if forming part of a Statute of general application be within the competency of the provincial Legislature, yet, having regard to the whole scheme of the Act in question they must be taken to have been directed to a purpose not within their competency. It is, therefore, necessary to inquire what is the *real* design and purpose, or, to use Lord WATSON's phrase, the "Pith and substance" of the Act : *Per* GRIFFITH, C.J. in *Attorney-General for Queensland v. Attorney-General for Commonwealth*, (1915) 20 C.L.R., at p. 160.

#### **Necessary and Incidental Powers.**

The propositions laid down by MARSHALL, C.J. in *McCulloch v. Maryland*, 4 Wheat., 316, were first, that the grant of enumerated powers impliedly carries with it the grant of all proper means, not expressly forbidden, to effectuate those powers ; and next, conversely, as such a grant of these powers and means would be entirely illusory unless their full and free exercise were intended, there arises a necessary implication that no State, even to the least extent, can derogate from the grant by usurping or opposing the powers, or, by obstructing the means of carrying them into execution. "These propositions," said Mr. Justice ISAACS, "not only commend themselves to the reason, but are supported by the principles enunciated in such cases as *Kielley v. Carson*, 4 Moo. P.C.C., 63 ; *Doyle v. Falconer*, L.R. 1 P.C., 328" : *Per* ISAACS, J. in *Baxter v. The Commissioner of Taxation, New South Wales*, (1907) 4 C.L.R., at p. 1156.

#### **Respective Powers of Commonwealth and States.**

"In considering the respective powers of the Commonwealth and of the States it is essential to bear in mind that each is, within the ambit of its authority, a sovereign State, subject only to the restrictions imposed by the Imperial connection and to the provisions of the Constitution, either expressed or necessarily implied" : *D'Emden v. Pedder*, 1 C.L.R., at p. 109.

**Design or Intention in Legislation.**

“ If the necessary, direct and immediate effect of the contract be to violate an Act of Congress and also to restrain and regulate inter-state commerce, it is manifestly immaterial whether the design to so regulate was or was not in existence when the contract was entered into. In such case the design does not constitute the material thing. The fact of a direct and substantial regulation is the important part of the contract and that regulation existing, it is unimportant that it was not designed. Where the contract affects inter-state commerce only incidentally and not directly, the fact that it was not designed or intended to affect such commerce is simply an additional reason for holding the contract valid and not touched by the Act of Congress. Otherwise the design prompting the execution of a contract pertaining to and directly affecting, and more or less regulating, inter-state commerce, is of no importance ” : *Addystone Pipe and Steel Co. v. United States*, 175 U.S., 211, cited in the *Federated Amalgamated Government Railway and Tramway Service Case*, 4 C.L.R., at p. 541.

**Ambit of Commerce Power.**

“ We think that the power of the Commonwealth Parliament to regulate inter-state trade and commerce, although unlimited within its ambit, cannot as a mere matter of construction, be held to have so wide an ambit as to embrace matters the effect of which upon that commerce is not direct, substantial and proximate. And, in our opinion, the general conditions of employment are not of this character. We arrive at this conclusion upon the mere language of section 51 (1.). But it is much fortified by the language of (xxxii.), which expressly empowers the Commonwealth Parliament to make laws for the control of State railways with respect to transport for the naval and military purposes of the Commonwealth. Having regard to the rules of construction, we think it is hard to reconcile the conferring of this express power with the implied existence under section 51 (1.) of a power which would undoubtedly if the larger construction contended for is adopted, not only include that conferred by (1.), but go far beyond it.” High Court : *Per GRIFFITH, C.J., and BARTON and O’CONNOR, JJ., in Federated Amalgamated Government Railway and Tramway Service Case*, (1906) 4 C.L.R., at p. 545.

**Reserved Powers of States.**

It should be regarded as a fundamental rule in the construction of the Constitution that when the intention to reserve any subject matter to the States to the exclusion of the Commonwealth clearly appears, no exception from that reservation can be admitted which is not expressed in clear and unequivocal words ; otherwise the Constitution will be made to contradict itself, which upon a proper construction must be impossible : *Attorney-General for New South Wales v. Brewery Employees' Union*, (1908) 6 C.L.R., at p. 503.

**Indirect Consequence.**

In many cases the result of the exercise of the power of taxation is to bring about indirect consequences which are desired by the legislator, and which could not practically, or could not so easily, be brought about by other means. The policy of protective tariffs rests upon this basis. The effect of a protective tariff may be to raise or lower prices, or to raise or lower rates of wages. In a Federal State it may not be within the competence of taxing authority to interfere directly with prices or wages, but the circumstances that a tax affects those matters indirectly is irrelevant to the question of competence to impose the tax : *Per GRIFFITH, C.J.*, in *The King v. Barger*, (1908) 6 C.L.R., at p. 66.

**Motive of Legislation.**

The motive which actuates the Legislature and the ultimate end desired to be attained, are equally irrelevant. A Statute is only a means to an end and its validity depends upon whether the Legislature is or is not authorized to enact the particular provisions in question, entirely without regard to their ultimate indirect consequences : *The King v. Barger*, 6 C.L.R., at p. 67.

**Apparent Conflict.**

The Constitution must be considered as a whole and so as to give effect as far as possible, to all its provisions. If two provisions are in apparent conflict a construction which will reconcile the conflict is to be preferred. If then it is found that to give a particular meaning to a word of indefinite, and possibly large, significance would be inconsistent with some definite and distinct prohibition to be found elsewhere, either in express words or by necessary implication, that meaning must be rejected. It follows that, if the control of the internal affairs of the States is in any particular



forbidden, either expressly or by necessary implication, the power of taxation cannot be exercised so as to operate as a direct interference. *Prima facie*, the selection of a particular class of goods for taxation by a method which makes the liability to taxation depend upon conditions to be observed in the industry in which they are produced, is as much an attempt to regulate those conditions as if the regulation were made by direct enactment: *Per* GRIFFITH, C.J. in *The King v. Barger*, 6 C.L.R., at p. 72.

### Meaning of Powers.

The meaning of the terms used in the Australian Constitution must be ascertained by their signification in 1900. The Parliament cannot enlarge its powers by calling a matter with which it is not competent to deal by the name of something else which is within its competence: *Per* GRIFFITH, C.J. in *The Attorney-General for New South Wales v. Brewery Employees' Union of New South Wales*, (1908) 6 C.L.R., 501.

The grant of powers contained in the Constitution must be construed as if one were interpreting it the day after it was passed: *Per* Lord ESHER, M.R. in *The Longford*, 14 P.D. L.C., 34 and 36. No subsequent Statute of the Commonwealth, assuming to enlarge the meaning of the term in question as here used, could effect such a purpose unless it were an amendment of the Constitution passed by the method prescribed by section 128 of that instrument. For the Federal Parliament is not, like that which sits at St. Stephens, a Sovereign Parliament. Legislative powers given by a written Constitution may be exercised to the full, but only as they stand. On the other hand, if the language of the Statute includes the whole genus, a species of that genus, unknown when the Act was passed and only afterwards coming into existence, it is still within the language. But in the case of the Constitution that rule of construction cannot be extended so as to bring what is not in essence a species within the language of the legislative powers: *Per* BARTON, J. in *The Attorney-General for New South Wales v. Brewery Employees Union of New South Wales*, 6 C.L.R., at p. 521.

### Incidental Effect of Law Immaterial.

The purpose for which the measure is enacted, that is for which the power is exercised, is exclusively a matter for the legislative mind, and is not open to review by a Court of law. The judiciary

concerns itself only with the existence and extent of the power, not with the occasion or purpose which may call for its exertion. And its existence and extent do not depend upon the fact that its exercise may or does incidentally interfere with circumstances which standing by themselves are controllable only by some other authority, or even with the operation or result of other powers, distinct in nature, possessed by other Legislatures. The lines of human affairs from their inherent complexity cross each other at innumerable points, and it is impossible to frame an arbitrary classification, such as that contained in section 51 of the Constitution, which will completely segregate the transactions of life. Consequently it is impossible to deny the existence of a stated power along a given line merely because another line not included in the list is affected at the inter-section : *Per ISAACS, J. in Osborne v. The Commonwealth*, (1911) 12 C.L.R., at p. 361.

When the primary matter dealt with such as public order and safety is within the grant of powers, although the free use of things in which men may have property is incidentally interfered with, that incidental interference does not alter the character or validity of the law : *Russell v. The Queen*, (1882) 7 App. Cas., at p. 839.

An Act passed by a Canadian provincial Legislature to restrict the consumption of liquor within the Province was upheld by the Privy Council although it necessarily interfered with Dominion revenue, with trades licensed under Dominion law and, indirectly, at least, with the business operations beyond the limits of the Province. This decision is very much to the point because in Canada the residual power is in the Dominion and yet the provincial Act was held valid : *Attorney-General of Manitoba v. Manitoba Licence Holders Association*, (1902) A.C., 73.

The American Oleomargarine Act was avowedly passed for the purpose of preventing public deception in the sale of the Article, but as it imposed a tax for the purpose, the Court was bound by what the Legislature did, and was not entitled to regard the purpose of the legislative action : *Kollock's Case*, 165 U.S., at p. 526. Chief Justice FULLER said, "The Act before us is, on its face, an Act for levying taxes, and although it may operate in so doing to prevent deception in the sale of oleomargarine as and for butter its primary object must be assumed to be the raising of revenue," 165 U.S., at p. 536.

In another American case *Hammond Packing Co. v. R. Kansas*, (1908) 112 U.S., at p. 348, the State statute was impeached on the ground that its real purpose was not within the sphere of the State power. The Chief Justice said :—"The mere incident or purpose for which the lawful power was exerted affords no ground to deny its existence" : 212 U.S., at p. 348.

The circumstances that an indirect effect may be produced by the exercise of admitted power is irrelevant to the question whether the Legislature is competent to prescribe the same results by a direct law . . . . The motive which actuates the Legislature and the ultimate end desired to be attained are equally irrelevant. A statute is only a means to an end, and its validity depends upon whether the Legislature is or is not authorized to enact the particular provisions in question entirely without regard to their ultimate indirect consequences : *The King v. Barger*, (1908) 6 C.L.R., at p. 627.

"The reasoning of the Supreme Court of the United States in *McCray v. United States*, 195 U.S., 27, is cogent upon this subject, and the case itself is very much in point. The conclusion drawn is thus expressed : 195 U.S., 27, at p. 56 :—The often quoted statement of Chief Justice MARSHALL in *McCulloch v. Maryland*, 4 Wheat., 316, that the power to tax is the power to destroy, affords no support whatever to the proposition that where there is a lawful power to impose a tax its imposition may be treated as without the power because of the destructive effect of the exertion of the authority. Other objections are taken by the plaintiff to the legislation as a whole on the ground of its usurpation of State powers. So far as these involve the scope and purpose of both or either of the Acts, I am of the opinion that they are covered by what I have already said" : *Per* BARTON, J. in *Osborne v. The Commonwealth*, (1911) 12 C.L.R., at p. 346.

### **What is Unconstitutional.**

The High Court of Australia like the Supreme Court of the United States has never declared a law invalid except on the ground that it is forbidden by the Constitution. The term "unconstitutional," as used in the American Courts has no other meaning than contrary to and forbidden by the Constitution, nor have those Courts ever claimed to do anything more than construe the written Constitution by the light of recognized canons. English jurisdic-

prudence has always recognized that the Acts of a Legislature of limited jurisdiction (whether the limits be as to territory or to subject-matter) may be examined by a tribunal before whom the point is properly raised. The term "unconstitutional," used in this connection means no more than *ultra vires*: *Per* GRIFFITH, C.J. in *Baxter v. Commissioner of Taxation*, (1907) 4 C.L.R., at p. 1125.

Operation of the Constitution and laws.

5. This Act, and all laws<sup>10</sup> made by the Parliament of the Commonwealth under the Constitution,<sup>11</sup> shall be binding<sup>12</sup> on the Courts, Judges, and people of every State, and of every part<sup>13</sup> of the Commonwealth, notwithstanding anything in the laws<sup>14</sup> of any State; and the laws of the Commonwealth shall be in force on all British<sup>15</sup> ships, the Queen's ships of war excepted, whose first port of clearance<sup>16</sup> and whose port of destination are in the Commonwealth.

**Conspectus of Notes to Clause V.**

This section of the Imperial Act has been commonly referred to and cited as "covering clause v." in order to avoid confusing it with section 5 of the Constitution.

It will be conducive to clearness if we classify our notes on covering clause v. with due regard to the sequence of the words in the Constitution, and present the cases decided by the Courts in properly classified groups, in order to illustrate the effect and operation of the clause in conjunction with cognate sections and provisions of the Constitution.

§10. "THIS ACT AND ALL LAWS MADE BY THE PARLIAMENT."

- Supremacy of the Constitution.

§11. "UNDER THE CONSTITUTION."

§12. "BINDING ON THE COURTS JUDGES AND PEOPLE."

The Province of the Judiciary.

Jurisdiction of the State Courts to Inquire.

Commonwealth immunities affirmed.

Commonwealth immunities waived.

Instrumentalities of Government.

Commonwealth powers affirmed.

Powers denied to the Commonwealth.

§13. "EVERY PART OF THE COMMONWEALTH."

Territorial basis of the Commonwealth.

Extra territorial operation of laws.

## §14. "THE LAWS OF ANY STATE."

Where State laws prevail.

State immunities affirmed.

State immunities waived.

State powers affirmed.

Powers denied to the States.

Severability of invalid laws.

## §15. "BRITISH SHIPS."

## §16. "FIRST PORT OF CLEARANCE AND PORT OF DESTINATION."

§ 10. "THIS ACT AND ALL LAWS MADE BY THE  
PARLIAMENT."**Supremacy of the Constitution.**

"This Act" means the Commonwealth of Australia Constitution Act (covering Clause I.). It consists of nine clauses, the last of which introduces the Constitution in these plain and simple words:—"The Constitution of the Commonwealth shall be as follows." This Act contains the supreme law of the land; the charter of Australian Federated Government under the Crown. It is the law of the Constitution, standing on a higher plane in its origin than the law made by "the Parliament of the Commonwealth" or "the laws of any State."

Laws made by the Parliament of the Commonwealth may, for purposes of review, be divided into two classes. The first class would include those passed in the exercise of powers vested exclusively in the Commonwealth Parliament, such as laws relating to the seat of Government, Federal territories, Commonwealth departments of public service; (section 52) and customs excise and bounties. (section 90). With respect to these laws no question of competition or inconsistency with State laws can arise for decision. The only question is:—"Are they within the terms of the grant?" The second class of laws are those passed by the Commonwealth Parliament in the exercise of powers concurrently vested in the Commonwealth and the States, such as quarantine, weights and measures, copyright, patent, bankruptcy, insolvency, naturalization, aliens, etc. Laws of this description if passed by the States have full force and effect until different provisions in that behalf are made by the Parliament of the Commonwealth. When such State laws are inconsistent with any law of the Commonwealth, the latter prevails and the former, to the extent of inconsistency, is invalid.

Covering clause V. of the Constitution Act is a pivotal provision around and in connection with which most of the legal controversies involving the interpretation of the powers *inter se* of the Commonwealth and States have been concentrated. It may be described as the centre of gravity of the Federal system of Australia which largely maintains the balance and equilibrium of the whole. Every word and phrase in clause V. is of the utmost value and consequence in the interpretation of the constitutional powers of the Commonwealth and the States, and each of them has already been subjected to minute scrutiny and analysis by the Courts and Judges.

In the leading case of *D'Emden v. Pedder*, (1904) 1 C.L.R., at p. 117, the Chief Justice, Sir SAMUEL GRIFFITH, said :—

“ In no American or Canadian case that we find has it been denied or even doubted ‘ that the Constitution and the laws made in pursuance thereof are supreme ; that they control the Constitutions and laws of respective States, and are not controlled by them.’ Nor has it been in any way questioned. ‘ 1st, that a power to create is a power to preserve ; 2nd, that a power to destroy, if wielded by a different hand, is hostile to, and incompatible with, these powers to create and to preserve ; 3rd, that, where this repugnancy exists, that authority which is supreme must control, not yield to, that over which it is supreme ’ : (MARSHALL, C.J., 4 Wheat., at p. 426). These declarations, which are so obvious as to be almost truisms, have found clear expression in the Act establishing the Constitution, which, in its covering clause V., commands that ‘ This Act and all the Laws made by the Parliament under the Constitution, shall be binding on the Courts, Judges, and people of every State and of every part of the Commonwealth, notwithstanding anything in the laws of any State.’ ” : *Per GRIFFITH, C.J. in D'Emden v. Pedder*, (1904) 1 C.L.R., at p. 117.

In the *Commissioners of Taxation v. Baxter*, (1907) 4 C.L.R., at p. 1125, the Chief Justice (Sir SAMUEL GRIFFITH), referred to covering clause V. as declaring the Constitution to be a supreme law of the land, and as declaring the Constitution and Federal laws to be part of the laws of the State, which the State Courts are bound to administer : (See also *Bayne v. Blake*, 5 C.L.R., 497, 506).

In *The King v. Sutton*, 5 C.L.R., at p. 807, Mr. Justice O'CONNOR quoted clause V. as supporting the decision of the Court that, in relation to the exclusive power of the Commonwealth, State boundaries disappear, the whole of Australia becomes one territory, and a Commonwealth law may bind or except from its operation States or Executive Governments of States.

In the *Attorney-General for New South Wales v. Brewery Employees' Association*, 6 C.L.R., at p. 585, Mr. Justice ISAACS, one of the dissenting Justices, cited this clause in opposition to the view of the majority of the Court that the legislative power of the Commonwealth as to trade marks must be given a limited construction to leave room for the "reserved powers" of the States. In the *Federated Saw-Mills (Woodworkers') Case*, 8 C.L.R., at pp. 530-2, 535-6, 542, and the *Australian Boot Trade Employees' Union v. Whybrow*, at 10 C.L.R., pp. 310, 331, Mr. Justice ISAACS and Mr. Justice HIGGINS, also in dissenting judgments, both relied on covering clause V. in opposition to the decision of the majority of the Court that industrial awards made by the Commonwealth Court of Conciliation and Arbitration; could not prevail over the determinations of State wages boards. "Covering clause V." said Mr. Justice ISAACS, "is unalterable. It declares that, that Act and all Commonwealth laws under the Constitution shall be binding on the Courts, Judges and people of every State, and every part of the Commonwealth notwithstanding anything in the laws of any State. Therefore, if we went no further, once concede, as the question does, and as the argument did, that in the absence of a contrary State law a given award might be made by virtue of a Federal law, then clause V. declares that the Federal law shall continue to authorize such an award 'notwithstanding anything in the laws of any State.' In another passage His Honor describes covering clause V. in conjunction with section 109 as "the keystone of the federal structure": *Per ISAACS, J. in the Federated Saw-Mill (Woodworkers) &c. Employees of Australia v. James Moore & Son Proprietary Ltd.*, (1909) 8 C.L.R., at p. 530.

Covering clause V., therefore affords a convenient place and opportunity for giving, thus early in our Notes on the Constitution, some account of the development of certain aspects in the interpretation of the instrument.

### § 11. "UNDER THE CONSTITUTION."

These are words of limitation qualifying the words "All Laws." They indicate that only laws made by the Parliament of the Commonwealth in pursuance of the Constitution, in accordance with the Constitution, and within the limits of the Constitution, are binding on the Courts, Judges and people. If such laws are not so framed they are not binding; they are *ultra vires* and null and void and

may be so pronounced in a suit between definite parties brought in a Court of competent jurisdiction.

If a Commonwealth law offends against any of the declarations of right contained in the Constitution, *e.g.*, section 92, it would be invalid. If a Commonwealth law were passed in a manner contrary to the procedure provided by section 55 it would be invalid. Even Commonwealth laws passed in the assumed exercise of exclusive powers would be examinable. In these several instances no question of state rights could arise. Constitutional rights might be involved, but not State rights. If a Commonwealth law within the sphere of concurrent powers is passed and there is any inconsistency between such law and a State law the former prevails notwithstanding the State law.

## § 12. "BINDING ON THE COURTS, JUDGES AND PEOPLE."

### The Province of the Judiciary.

The question whether an Act of the Federal Legislature repugnant to the Constitution can become the law of the land and whether it is binding on the courts, judges and people was considered and for ever settled by the Supreme Court of the United States in the leading case of *Marbury v. Madison*, (1803) 1 Cranch., 137. The Judiciary Act passed by Congress purported to give the Supreme Court jurisdiction "to issue writs of mandamus, in cases warranted by the principles and usages of law, to any courts appointed, or persons holding office, under the authority of the United States." An application for a writ of mandamus directed to Mr. Madison, Secretary of State (United States), requiring him to deliver to William Marbury his commission as a justice of the peace was refused on the ground that the words of the Act "or persons holding office" were not warranted by the Constitution.

The Constitution of the United States upon the model of which that of the Commonwealth of Australia has been framed was based upon what is generally known as the Federal system. In that system there is a dual form of Government in which sovereign powers are distributed among two sets of governing organs or agencies. To one of these sets called the federal or national is assigned functions of a general character relating to the interests of the whole of the people considered as a national aggregation. To the set called the States is assigned the work of local government. In the



Federal sphere as in the State sphere there are different departments of government known as the legislative, the executive and the judicial departments. Each department having powers and functions defined by the Constitution. The Constitution has thus established metes and bounds not to be transcended by those departments. The Constitution is the supreme paramount law unchangeable by ordinary legislation and amenable only in a specified manner upon reference to the people either indirectly through the State legislative as in the United States or directly as in Australia. Hence a legislative act either of the Federal Legislature or of a State Legislature which is contrary to the Constitution is not law. These are preliminary propositions which must be stated and understood before the judgment of the Supreme Court of the United States in *Marbury v. Madison* can be properly appreciated. Chief Justice MARSHALL in that important case said :—

“ It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.

“ If an act of the Legislature, repugnant to the Constitution, is void, does it, notwithstanding its invalidity, bind the courts, and oblige them to give it effect ? Or, in other words, though it be not law, does it constitute a rule as operative as if it were a law ? This would be to overthrow in fact what was established in theory : and would seem, at first view, an absurdity too gross to be insisted on. It shall, however, receive a more attentive consideration.

“ If a law be in opposition to the Constitution ; if both the law and the Constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the Constitution, or conformably to the Constitution, disregarding the law, the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.

“ If, then, the courts are to regard the Constitution, and the Constitution is superior to any ordinary act of the Legislature, the Constitution, and not such ordinary act, must govern the case to which they both apply.

“Those, then, who controvert the principle that the Constitution is to be considered, in court, as a paramount law, are reduced to the necessity of maintaining that courts must close their eyes on the Constitution, and see only the law.

“This doctrine would subvert the very foundation of all written constitutions. It would declare that an act which, according to the principles and theory of our government, is entirely void, is yet, in practice, completely obligatory. It would declare that if the Legislature shall do what is expressly forbidden, such act, notwithstanding the express prohibition, is in reality effectual. It would be giving to the Legislature a practical and real omnipotence, with the same breath which professes to restrict their powers within narrow limits. It is prescribing limits, and declaring that those limits may be passed at pleasure”: *Marbury v. Madison*, (1803) 1 Cranch., 137.

#### **Jurisdiction of State Courts to Inquire.**

The jurisdiction of State Courts to examine Federal legislation and question or affirm its validity was considered by the Full Court of Victoria in the case of *Kingston v. Gadd*, (1902) 27 V.L.R., 417. In that case which was decided before the constitution of the High Court, the Minister of Customs for the Commonwealth brought an action against the master of the British ship *Oceana*, to recover penalties under section 192 of the *Customs Act* 1901 for the ship entering the Port of Melbourne with the custom's seal broken and for the use of stores within the Commonwealth on which duty had not been paid. The defence to the action was that, section 192 was null and void, and that it was *ultra vires* of the powers of legislation conferred on the Federal Parliament by the Constitution of the Commonwealth. Alternatively it was contended that so much of the said section as purports to impose the said penalty upon any ship entering any port with her seals broken—such seals being broken more than ten miles from land on the high seas—is void and of no effect and *ultra vires* as aforesaid.

Mr. Justice WILLIAMS said :—

“At the commencement of their argument counsel for the plaintiff met the defences raised by the contention that, assuming that section 192 and sections 127 and 128 of the *Customs Act* 1901 are *ultra vires*, the Court should not, and would not, inquire into that question, but would assume that they were *intra vires*, citing

various authorities in support of that position. In our opinion those authorities are displaced, and the contention is clearly answered by section V. of the Commonwealth of Australia Constitution Act. That section provides that 'this Act, and all laws made by the Parliament of the Commonwealth under the Constitution shall be binding on the Courts, judges and people of every State and of every part of the Commonwealth.' The words 'and all laws made by the Parliament of the Commonwealth under the Constitution' mean 'in pursuance of the Constitution.' If they are not so made, they are not binding on this Court, and it is therefore our duty to inquire and ascertain whether the sections to which we have referred, and under which the penalties in this action are sought to be enforced, and in so far as they relate to the specific offences charged, constitute legislation which the Parliament of the Commonwealth has power to impose under or in pursuance of the Constitution. We have now, therefore, to perform the duty which is cast upon us of inquiring and ascertaining whether, with the limitation mentioned, section 192 and sections 127 and 128 of the Customs Act 1901, or any of them, are *ultra vires* the powers contained in the Commonwealth of Australia Constitution Act. But I again repeat that we only consider that question, so far as it is necessary to do so, in relation to the specific offences here charged, and in respect of which penalties are claimed."

Mr. Justice HOLROYD said :—

"At the hearing of this action a proposition was advanced by counsel for the plaintiff, which, if I rightly understood it, I hope will not find acceptance with any judge. It is this, that if the Parliament of the Commonwealth makes a law which encroaches upon the legislative power of any State, no court or judge in any State has the right to declare that such a law was one which the Parliament of the Commonwealth was not authorized by the Constitution to make, or even the right to inquire into the validity of any such law. In my opinion, that is not the true construction of section V. of the Commonwealth Constitution Act. It is by that section enacted that the Commonwealth Constitution Act itself, and all laws made by the Parliament of the Commonwealth under the Constitution shall be binding on the Courts, judges and people of every State and of every part of the Commonwealth, notwithstanding anything in the laws of any State. *Expressio unius exclusio alterius*. All laws made by the Commonwealth, but not made under

the Constitution, that is, not made by virtue of the powers conferred upon the Commonwealth by its Constitution, are not binding upon the Courts, judges or people of any State and ought to be rejected by the Courts and judges of every State as invalid whenever any question arises as to validity. Counsel for the defendant propounded another doctrine, which is to my mind equally unsound. They maintained in effect, if not in so many words, that when the validity of any enactment of the Parliament of the Commonwealth is in question before any Court legally competent to pronounce an opinion upon its validity, the Court may inquire into the motive which actuated its author, and may be influenced in its judgment by its conception of what that motive was. I adjure that doctrine absolutely. The Court has to decide, subject, of course, to appeal, where an appeal lies, whether the enactment is legal or not. With the motive of the authors the judge or judges have no concern."

Mr. Justice HOOD said :—

"The legislative powers of the Commonwealth Parliament are delegated powers, bestowed by the paramount authority, the Parliament of Great Britain. That being so, it seems to me that the authorities quoted in respect to the duty of English Courts with regard to English legislation cannot be applied in their full extent the relations of this Court to the Federal Parliament. A distinction exists which it may not be easy to define, but which is none the less substantial. The delegated authority must be exercised within the prescribed limits, and over the prescribed subjects. The Courts, therefore, before enforcing Commonwealth law, ought to investigate and determine whether or not that law is in substance one which there is jurisdiction to make. That question cannot arise in England, for there is no limit to the jurisdiction of the English Parliament, so far as the Courts are concerned. But it does arise here. Doubtless, we should scrutinize the conduct of the High Court of Parliament with the most sincere desire to support it. But, I consider that, when called upon by any person assailed before us under any law made by a Legislature with limited powers, we are not only entitled, but it is our bounden duty to investigate and determine the question of the validity of that law to the extent of seeing whether it is such an one as is properly included in the authority given by the Imperial Legislature": (1902) 27 V.L.R., 417.

A forecast of the doctrine of the immunity of Commonwealth agencies and instrumentalities from State taxation has been already

given (see page 79). Reference has been made to the three great constitutional cases, in two of which the doctrine was affirmed by the High Court of Australia, and in one of which it was denied by the Privy Council. A more detailed statement is appropriate under covering clause V. which is the *Fons et Origio* of all Commonwealth instrumentalities and agencies. These cases gave rise to constitutional discussions of immense importance, and they helped to unfold the Constitution of the Commonwealth, to materialize its outlines and visualize its principles, in a manner which would not have been possible apart from its actual working and operation. These cases are also important as they paved the way for two Acts of Commonwealth legislation, one permitting State taxation of Commonwealth salaries subject to certain conditions and the other limiting the possibility of future appeals to the Privy Council in cases involving powers *inter se* of the Commonwealth and the States. State Acts waiving the immunity of State official salaries from Commonwealth taxation were also passed.

#### **Instrumentalities of Government.**

The doctrine of the immunity of Federal instrumentalities from State interference, was, in Australia first discussed in *Wollaston's Case*, (1902) 28 V.L.R., 357. This was a special case, stated by the Commissioner of Taxes for Victoria, for a pronouncement as to whether Dr. Wollaston, Comptroller-General of Customs for the Commonwealth was liable to be assessed in Victoria (the State in which he resided and in which most of his official duties were performed) for State income tax on his Federal salary. The Supreme Court of Victoria held that he was liable. The principle of *McCulloch v. Maryland* was held not to be applicable; partly on the authority of *The Bank of Toronto v. Lambe*, (1887) 12 A.C., 575, and partly on the ground of difference between the American and Australian Constitutions—especially that what in America was a “doctrine of necessity” was not so in Australia, where the King’s power of disallowance might be called in to check legislative encroachment by the States.

When, shortly afterwards, the High Court of Australia was established, the first great constitutional case which came before it turned upon the same doctrine that had received short shrift from the Supreme Court of Victoria. In *D’Emden v. Pedder*, (1904) 1 C.L.R., 92, the question in issue was the application of a State

stamp tax to a receipt given by a Commonwealth officer for his salary. In this case the High Court established and explained the broad principle of the immunity of Federal agencies and instrumentalities from State legislation, taxation, and interference, a doctrine which, with its logical converse extension to the immunity of State instrumentalities from Federal interference, has since been affirmed in a series of cases.

The Tasmanian Stamp Duties Act (2 Edward VII., No. 30) prescribes *inter alia*, "that from 1st January, 1903, there shall be levied in respect of . . . every receipt, where the sum received amounts to £5 and under £50 . . . a stamp duty of 2d." Police Superintendent Pedder, in the public service of Tasmania, summoned Deputy Postmaster-General D'Emden to appear before the Court of Petty Sessions in Hobart, on an information which alleged that defendant "did on the 31st March, 1903, in Tasmania aforesaid give to the paying officer of the Commonwealth of Australia a receipt liable to duty, to wit a receipt for the sum of £41 9s. 8d. for salary and wages due from the said Commonwealth to the said H. L. D'Emden for the period from the 1st to the 31st day of March, 1903, the said receipt when so given by the said H. L. D'Emden as aforesaid not being duly stamped." Defendant was convicted, and ordered to pay a fine of 1s. and costs. He appealed to the Supreme Court of Tasmania. The case was heard before the Full Court (DODDS, C.J., CLARK, J., and McINTYRE, J.). By a majority, DODDS, C.J., and McINTYRE, J. (CLARK, J., dissenting), it was held that the appellant was liable to pay the duty, under the State Stamp Act, in respect of the receipt in question, and the conviction was affirmed. From this decision the defendant appealed to the High Court.

On behalf of the State of Tasmania it was contended that the powers reserved to the States by section 107 of the Constitution extended to direct taxation; that the imposition of stamp duty upon receipts given on the payment of money is an ordinary form of direct taxation; that a Federal officer giving such a receipt for his salary is in no different position from any other recipient of money from a debtor in the State, and that the provisions of the Constitution as to the exclusive authority of the Commonwealth Parliament ought to be read subject to this power of the States, whether regarded as a power expressly reserved, or as one impliedly reserved from the nature and necessity of the case. The High Court,

consisting of Sir SAMUEL GRIFFITH, C.J., Mr. Justice BARTON and Mr. Justice O'CONNOR, unanimously upheld the appeal, reversed the decision of the Supreme Court of Tasmania, and quashed the conviction. In delivering the judgment of the High Court the Chief Justice in clear, unmistakable and memorable words laid down some fundamental propositions which have since been affirmed and followed in other cases.

“ In considering the respective powers of the Commonwealth and of the States, it is essential to bear in mind that each is within the ambit of its authority, a sovereign State, subject only to the restrictions imposed by the Imperial connection and to the provisions of the Constitution, either expressed or necessarily implied. It must, therefore, be taken to be of the essence of the Constitution that the Commonwealth is entitled within the ambit of its authority, to exercise its legislative and executive powers in absolute freedom, and without any interference or control whatever except that prescribed by the Constitution itself. It follows that when a State attempts to give to its legislative or executive authority an operation which, if valid would fetter, control, or interfere with, the free exercise of the legislative or executive power of the Commonwealth, the attempt, unless expressly authorized by the Constitution, to that extent is invalid and inoperative”: *Per* GRIFFITH, C.J., 1 C.L.R., at pp. 109-111.

After *D'Emden v. Pedder* it was inevitable that the decision in *Wollaston's Case* (*supra*, p. 79) should be challenged. This happened in the case of *Deakin v. Webb*, (1903-4) 1 C.L.R., 585, when the High Court of Australia over-ruled the decision of the Full Court of Victoria in *Wollaston's Case* and in *Webb v. Deakin* and held that the salaries of a Minister of the Crown for the Commonwealth and a member of the Commonwealth Parliament, so far as they are earned in Victoria, and are not liable to assessment under the Income Tax Acts of Victoria (1903-4) 1 C.L.R., 586).

In this case, counsel for the Commissioner of Taxes challenged the applicability to the Australian Constitution of the doctrine of implied prohibition of State interference with Federal instrumentalities. They also argued that the case was not within the doctrine, as the income tax on the salary of a Federal officer, in common with other income, was not an interference with the officer as an officer. The Court adhered to the principle as laid down in *D'Emden v.*

*Pedder*, and held (as it had been held in the United States in the case of *Dobbins v. Commissioners of Erie*, 16 Peters, 435, and in Canada in the case of *Lephrohon v. Ottawa*, (1878) 2 Ont. App., 522) that the taxation of salaries was within the principle. The High Court further held that the liability of a Commonwealth officer to an income tax imposed by a State Act in respect to his salary as such officer, is a question as to the limits *inter se* of the constitutional powers of the Commonwealth and those of a State within the meaning of section 74 of the Constitution, and, therefore, the decision of the High Court as to such liability is final and conclusive unless the Court certifies that the question is one that ought to be determined by His Majesty in Council: 1 C.L.R., 566. The High Court, therefore, refused leave to appeal to the Privy Council.

This, however, did not end the matter. Though the decision in *Deakin v. Webb* could not be appealed from, a way was found of bringing the question before the Privy Council in another case, by appeal from a State Supreme Court direct to the Privy Council. Mr. Outtrim, the Deputy Postmaster-General of Victoria, having objected to the assessment of his salary for income tax, the Commissioner of Taxes submitted a special case, which was referred to the Full Court of Victoria. That Court, feeling itself bound by the decision of the High Court in *Deakin v. Webb*, decided against the Commissioner, who thereupon obtained from Mr. Justice HODGES leave to appeal to the Privy Council (*Outtrim's Case*, (1905) V.L.R., 463). The appeal came on for hearing before the Privy Council in May 1906: *Webb v. Outtrim*, (1907) A.C., 81. The Commonwealth obtained leave to intervene and was represented before the Board. Their Lordships were unable to acquiesce in the principle of constitutional interpretation laid down by the High Court in *Deakin v. Webb*, 1 C.L.R., 585 and 606.

The EARL OF HALSBURY in delivering judgment said :—

“ The Legislature must have had in their minds the Constitution of several States with respect to which the Act of Parliament which their Lordships are called upon to interpret was passed. The 114th section of the Constitution Act sufficiently shows that protection from interference on the part of the Federal power was not lost sight of. It is impossible to suppose that the question now in debate was left to be decided upon an implied prohibition when the power to enact laws upon any subject whatsoever was before the Legislature. For these reasons their Lordships are not able to acquiesce in the reasoning of the High Court judgments governing the judgment under appeal. They will therefore humbly advise



His Majesty that the judgment of the Supreme Court of Victoria ought to be reversed, that it ought to be declared that the salary in question was rightly included in the State assessment and was liable to income tax, and that each party ought to pay his own costs of the special case and in the Supreme Court": *Per HALSBURY*. L.C., (1907) App. Cas., at p. 91.

A remarkable situation was thus reached. Although the Constitution by section 74, made the High Court the final arbiter in questions involving the distribution of power between Commonwealth and States, except on questions which the High Court itself certified to be proper for decision by the Privy Council—and although the High Court had on this particular question refused so to certify—the question had yet been taken, through another channel, to the Privy Council, and the Privy Council had given a decision which was in conflict with that of the High Court. The framers of the Judiciary Act 1903 had foreseen such a possibility—which arose from the fact that the Constitution, whilst giving a right of appeal from the State Supreme Courts to the High Court, had not taken away the existing right of appeal from the State Supreme Court direct to the Privy Council—and had inserted a provision to meet the difficulty. Acting under the powers conferred by section 77 of the Constitution, they had, in section 39 of the Judiciary Act, in respect of matters within the original jurisdiction of the High Court, taken away the jurisdiction which the State Supreme Courts possessed, as State tribunals, and invested the same Courts with Federal jurisdiction in the same matters, subject to the condition that their decisions should be final except so far as an appeal might be brought to the High Court. It has since been held by the High Court (*Baxter v. Commissioners of Taxation*, 4 C.L.R., 1087) that this provision is valid and effects its purpose; but in granting leave to appeal in *Outtrim's Case*, Mr. Justice HODGES, before whom the question was argued, regarded the provision as an invalid attempt to bar an appeal to the Privy Council from a State Court exercising State jurisdiction; and the Privy Council adopted his conclusions.

Relying on the decision of the Privy Council, the Commissioners of Taxation in New South Wales now brought an action in the Sydney District Court against Baxter, a Commonwealth officer of customs, for income tax; and District Court Judge, MURRAY, followed the decision of the Privy Council in *Webb v. Outtrim*, and gave judgment for the plaintiffs. Baxter appealed to the High Court; and the High Court, holding that in regard to a question of

the limits *inter se* of Federal and State constitutional powers (see Notes to section 74 of the Constitution, *infra*) it was not bound by the Privy Council decision, affirmed its previous decisions: *Baxter v. Commissioners of Taxation*, 4 C.L.R., 1087.

### Two Lines of Reasoning in *Deakin v. Webb*.

The judgment of the majority of the High Court in the *Baxter Case*, which bears traces of the master hand of the Chief Justice (Sir SAMUEL GRIFFITH), after disposing of minor and subsidiary questions went to the heart of the main controversy:—

“ We proceed to examine the opinion of the Board in *Webb v. Outtrim*, (1907) A.C., 81, for the purpose of discovering what new light, if any, it throws upon the questions involved in other decisions of this Court. In *Deakin v. Webb*, 1 C.L.R., 585, this Court stated at length the reasons for its conclusion. The judgment was based upon two distinct lines of reasoning; first, that of the judgment of Chief Justice MARSHALL in *McCulloch v. Maryland*, 4 Wheat., 316.

“ It is essential to the attribute of sovereignty of any Government that it shall not be interfered with by any external power. The only interference, therefore, to be permitted is that prescribed by the Constitution itself. A similar consequence follows with respect to the constituent States. In their case, however, the Commonwealth is empowered to interfere in certain prescribed cases. But under the scheme of the Constitution there is a large number of subjects upon which the legislative powers of both the Commonwealth and the State may be exercised. In such a state of things it is not only probable, but, as shown by the experience of the United States under a similar distribution of powers, certain, that questions will constantly arise as to the operation of laws which, although unobjectionable in form, and *prima facie* within the competence of the legislature which enacted them, would, if literal effect were given to them, interfere with the exercise of the sovereign powers of the other of the two sovereign authorities concerned. Applying then the doctrine *quando lex aliquid concedit concedere videtur et illud sine quo res ipsa valere non potest*, which is a maxim applied to the construction of all grants of power, from the highest to the lowest, it follows that a grant of sovereign powers includes a grant of a right to disregard and treat as inoperative any attempt by any other authority to control their exercise.

"A remarkable illustration of the application of this maxim is afforded by the very recent case of *Attorney-General v. Cain and Gilhula*, (1906) A.C., 542, where it was held that the doctrine might be applied so as to warrant the exercise of State powers even beyond territorial limits. In the *Federated Amalgamated Government Railway and Tramway Service Association v. New South Wales Railway Traffic Employees' Association*, (1906) 4 C.L.R., 488, this Court applied the same doctrine to a Commonwealth law, the validity of which was successfully impeached by the very States that are now, in effect, asking us to over-rule the decision in that case.

"The second line of reasoning in *D'Emden v. Pedder*, 1 C.L.R., 91, and *Deakin v. Webb*, 1 C.L.R., 585, was" said the Chief Justice, "that as the scheme of the Australian Constitution was in this respect practically identical with that of the Constitution of the United States of America, which had been interpreted by the Supreme Court of that Republic in a long series of cases familiar to the Australian publicists by whom the Australian Constitution was framed, it ought to be inferred that the intention of the framers was that like provisions should receive like interpretation. This is a well recognized rule of construction, and its application is not limited to Statutes of the same Legislature."

#### **Points not Argued in Privy Council.**

"It does not appear from the report" continued the Chief Justice "that the Board addressed their minds to the first line of reasoning adopted by this Court, although they recognize the great authority of Chief Justice MARSHALL, and it may perhaps be inferred that if they had thought that the two Constitutions were substantially identical as to the part of their respective structures now concerned they would have been disposed to give some effect to his opinion. This point, which lies at the root of the whole matter, does not seem to have been argued by counsel for the respondent, although the judgments of this Court were referred to by the appellant's counsel."

#### **Alleged Want of Analogy.**

"So far" said the Chief Justice, "as we are able to follow the opinion of the Board, they thought that there was no actual analogy between the two Constitutions—United States and Australia—so far as regards the express provisions relevant to the question, although they confess their lack of familiarity with the subject, and

say it is difficult to understand the application of the principles involved unless the comparison is made clear by the juxtaposition of the provisions. This remark is made between two quotations from the judgments of this Court in *D'Emden v. Pedder*, 1 C.L.R., 91, at p. 113, and *Deaken v. Webb*, 1 C.L.R., 585, at p. 606. If the learned Lord who delivered the opinion of the Board had read the whole of the paragraph from the judgment in *Deakin v. Webb* of which he quoted a portion, he would have found on the preceding page the relevant provisions set out in full in immediate juxtaposition, 1 C.L.R., 585, at p. 605. But, even if they had not been set out, we may be permitted to express regret that in a case of such vast importance to the Commonwealth their Lordships did not seek enlightenment from counsel or from the documents the subject of comparison."

#### Limited Impeachability of Colonial Acts.

In the judgment of the Privy Council the EARL OF HALSBURY attempted to show the want of analogy between the American and Australian Constitutions in this way. He said no State of the Australian Commonwealth has the power of independent legislation possessed by the States of the American Union. Every Act of the Victorian Council and Assembly requires the assent of the Crown, but when it is assented to, it becomes an Act of Parliament as much as any Imperial Act, though the elements by which it is authorized are different. If, indeed, it were repugnant to the provisions of any Act of Parliament extending to the Colony, it might be inoperative to the extent of its repugnancy (see *Colonial Laws Validity Act, 1865*), but, with this exception, no authority exists by which its validity can be questioned or impeached. The American Union, on the other hand, has erected a tribunal which possesses jurisdiction to annul a Statute upon the ground that it is unconstitutional. His Lordship further said :—" It is obvious that there is no such analogy between the two systems of jurisprudence as the learned Chief Justice (Sir SAMUEL GRIFFITH) suggests. The enactments to which attention has been directed do not seem to leave any room for implied prohibition. *Expressum facit cessare tacitum.*"

Dealing with these passages in the Privy Council judgment the Chief Justice (Sir SAMUEL GRIFFITH) said :—

" No argument was addressed to us founded upon this passage, except so far as it may be taken to refer to the controlling authority

involved in the power of the Sovereign to disallow any Act either of the Commonwealth or of any one of the States. It was contended that this fact effectively distinguishes the American from the Australian Constitution, and renders both the reasoning and the decision in *McCulloch v. Maryland*, 4 Wheat., 316, irrelevant."

"The statement that no State of the Australian Commonwealth has the same power of independent legislation possessed by the States of the American Union is of course literally correct, but only in the sense that its legislation is subject in some cases to be overriden by Federal legislation, and in all cases is, in the letter, liable to be disallowed by the Sovereign."

### **Judicial Power to Annul Invalid Acts.**

Referring to the EARL OF HALSBURY's observation that the American Union has erected a tribunal which possesses jurisdiction to annul a Statute on the ground that it is unconstitutional, the Chief Justice said :—

"This observation seems to be founded on the supposition that the Supreme Court of the United States was endowed with special powers in this respect different from those possessed by other Courts. That tribunal was created by a provision in the American Constitution identical with that by which the High Court is created. The power of the Supreme Court of the United States to decide whether an Act of Congress or of a State is in conformity with the Constitution depends upon and follows from the Constitution itself, which is, by section 2 of Article VI., declared to be the supreme law of the land, as the Australian Constitution is declared to be by section 5 of the Constitution Act. Such questions must certainly arise under a federal Constitution and must be determined by the Courts before which they are raised."

### **American and Australian Analogy.**

"The analogy between the two systems of jurisprudence" said the Chief Justice "is therefore perfect. Indeed, it may be said that in this respect they are identical, unless, indeed, the attribute of Sovereignty, using that term in any relevant sense, is denied to the Commonwealth. The King is the common head of the United Kingdom and of all the self-governing dominions, and the Legislature of each of these dominions has, subject to its own Constitution, full autonomy. It seems strange that in this year 1907,

when the world is resounding with praises of the system of the British Empire, which allows its different members to enjoy this freedom and independence, we should be asked to decide solemnly that the idea is an entire delusion. It is now, we suppose, well recognized that, except so far as regards relations with foreign powers, which are not now in question, the King as the head of each of these several autonomous States is so far a separate juristic person that differences and conflicts may arise between these States just as between other autonomous States which do not owe allegiance to a common Sovereign. It is too late to set up a contrary theory, unless it is intended to make a revolutionary change in the concept of the Empire."

### The Rule of Implied Prohibitions.

The Chief Justice next examined the reasoning of the Privy Council founded on the maxim : *expressum facit cessare tacitum*. With regard to the application of that maxim he said :—

" We would point out in the first place that all the express prohibitions on which reliance is or can be placed, with one exception, find their counterpart in the Constitution of the United States. The only section to which their Lordships expressly refer which has any bearing on the application of the maxim *expressum facit, &c.*, is section 114, which provides that :—' A State shall not, without the consent of the Parliament of the Commonwealth, raise or maintain any naval or military force, or impose any tax on property of any kind belonging to the Commonwealth, nor shall the Commonwealth impose any tax on property of any kind belonging to a State.' A little consideration will show that this section is not framed for the purpose of exhaustively defining the prohibitions upon the exercise of State powers, but altogether *alio intuitu*. Section 51 (vi.) empowers the Commonwealth Parliament to make laws respecting the naval and military defences of the Commonwealth and of the several States. This subject is, however, not included in section 52 as one within the exclusive power of the Commonwealth Parliament. Without more, therefore, the State Parliament could have continued to legislate on the matter of defence, subject to the provisions of section 109. But this was not intended. It was therefore, enacted by the first member of section 114, which corresponds exactly with section 10 of article I. of the United States Constitution, that this power, although not absolutely withdrawn from the

States, should not be exercised without the consent of the Commonwealth Parliament."

"The second member of the section prohibiting the taxation of State or Federal property deals with another subject. The rule of implied prohibition laid down in *McCulloch v. Maryland*, 4 Wheat., was an accepted part of the constitutional law of the United States, but it was held that it did not extend to prohibit the taxation of Federal property or State property in all cases. A distinction had been drawn, and is still accepted in the United States, between property held as an instrumentality of Government and property held by the Commonwealth or a State in the carrying on of an ordinary business or as an investment. See the cases cited in *South Carolina v. United States*, 199 U.S., 437; see also *Fort Leavenworth Railroad Co. v. Lowe*, 114 U.S., 525, at pp. 531, 539."

### **Express Prohibitions.**

"Sections 115, 116 and 117," said the Chief Justice "also contains express limitations upon the legislative powers of the States. Those sections deal, though not in identical manner, with the same matters as those dealt with respectively in article I., section 10, sub-section 1; in article VI., section 3 with the First Amendment, and in article IV., section 2, and section 1 of the 14th Amendment, of the United States Constitution. The American Constitution, therefore, as well as the Australian, contains express prohibitions, but it was never held that they precluded the admission of those necessary implications which are admitted in all other cases."

### **The Doctrine of Necessary Implication.**

"The framers of the Constitution," the Chief Justice went on to say "may be taken to have been aware of this fact, and also of the fact that the doctrine of necessary implication had been applied to the Constitutions of the British Dependencies in the case of Crown Colonies: see *In re Adam*, 1 Moo. P.C.C., 460, and the Queensland Constitutional case already cited. (Compare *Attorney-General v. Cain and Gilhula*, (1906) A.C., 542, to the same effect). The maxim *expressum facit, &c.* has been often invoked in vain in English Courts. See for instance, *Colquhoun v. Brooks*, 21 Q.B.D., 52, at p. 65, where Lopes, L.J. called it 'a valuable servant, but a dangerous master'."

**Reservation and Disallowance of Laws.**

The Chief Justice then passed to the argument that recourse may be had in connection with legislation in Australia to the constitutional power of reservation by the Governor or the power of disallowance by the King. The first objection that occurred to that argument was, he said, that it would be obviously inapplicable to the case of a State law, such as that now in question, passed before the establishment of the Commonwealth, and as to which the question is whether, if literally construed, it interfered with the free exercise of the powers of the Commonwealth. The next answer is that the ambit of a power cannot be controlled by the manner of its execution. In order that the power of reservation or disallowance may be effectual to avoid the difficulty, it must be capable of operation in such a way as either to prevent conflicts from arising or to compose them when they have arisen. The latter function could not in any view be performed after the prescribed limits of time for the exercise of the power has elapsed, which might easily happen before the ground of objection had been discovered.

**D'Emden v. Pedder.**

"For these reasons" concluded the judgment "we are of opinion that the implication of a prohibition of mutual interference is as necessary in the case of the Australian Constitution as in that of the United States of America, and that the doctrine laid down in *D'Emden v. Pedder*, 1 C.L.R., 91, at p. 111, that when a State attempts to give to its legislative or executive authority an operation which, if valid, would fetter, control or interfere with, the free exercise of the legislative or executive power of the Commonwealth, the attempt, unless expressly authorized by the Constitution is to that extent invalid and inoperative," should be once more affirmed by this Court notwithstanding the opinion of the Judicial Committee in *Webb v. Outtrim*, (1907) A.C., 81. The rule, which was then laid down is, in the words of Chief Justice MARSHALL, 'Safe for the States and safe for the Commonwealth.' The contrary rule would be dangerous and ruinous for the States, and dangerous and ruinous for the Commonwealth and would substitute chaos for order, and set up an official in London subject to political accidents in place of the High Court as the guardian of the Constitution. Nor is the danger an imaginary one, for history tells us that many attempts have been deliberately made in the United States to hamper the Federal



Government by State laws which have been afterwards declared invalid by the Supreme Court": *Per* GRIFFITH, C.J. in *Baxter v. New South Wales Commissioner of Taxes*, 4 C.L.R., 1132-33.

Mr. Justice ISAACS approved of the principle of *D'Emden v. Pedder*, and said:—

"Up to this point I am for the reason I have given, in entire accord with the majority of the Court. When, however, I come to apply these principles to the Income Tax Acts I have the misfortune to find myself unable to share their opinion. These Statutes do not appear to me to infringe the doctrine of non-interference. They do not on the face of them, and they do not, I think, in their necessary and reasonable effect transcend the limits of any federal power. The income tax is demanded from all citizens alike, it is obviously not levelled at the Federal authority, and I cannot persuade myself that by reason of the impost there is actually, or will probably be any diminution or impairment of service rendered to the Commonwealth. The reasoning of the Supreme Court of the United States in the case of *Dobbins v. Commissioners of Erie County*, 16 Peters, 435, as to the effect of the tax undoubtedly supports the appellants' contention that these Acts are invalid. But I am not able to adopt that reasoning."

Mr. Justice HIGGINS said the inadequacy of the reasons used by the Judicial Committee in giving its judgment in *Webb v. Outtrim* added greatly to the difficulty of dealing with this case. He concurred with the Chief Justice in thinking that there is nothing in the reasoning of the law lords in *Webb v. Outtrim*, (1907) A.C., 81, calculated to satisfy men who are familiar with the long line of decisions in the United States that *Deakin v. Webb*, 1 C.L.R., 585, was wrong. But he considered that the King in Council being still the appellate Court from the High Court, and the High Court a Court from which appeal can be brought to the King in Council, it was the duty of the High Court to accept the decision of the King in Council as the final statement of the law. The Land and Income Tax Act of New South Wales, in his opinion, was not an interference with Federal instrumentalities.

### **Waiver of Commonwealth Immunities.**

The Commissioners of Taxation thereupon petitioned the Privy Council for special leave to appeal against this decision. But, meanwhile, the Federal Parliament, recognizing that, whatever the

legal rights might be, there were strong grounds of public policy for placing Federal officers on an equal footing, as regards taxation of their salaries, with other citizens, passed the Commonwealth Salaries Act 1907, which declared that the taxation by a State, in common with other salaries earned within the State, of the salaries of Commonwealth officers resident in the State and the allowances of Federal Ministers and members of Parliament elected in the State, should not be deemed—

“(a) to be an interference with the exercise of any power by the Commonwealth ; or

(b) to be inconsistent with any Act by or in pursuance of which the salary is fixed or made payable.”

This Act was assented to in October 1907, and in November the petition for special leave to appeal was heard by the Privy Council. In January 1908, the Privy Council refused leave on the express ground that the Commonwealth Salaries Act 1907 had settled for the future the question in dispute.

The validity of the Commonwealth Salaries Act was challenged in *Chaplin v. Commissioners*, 12 C.L.R., 375, when a Commonwealth officer in South Australia claimed that the immunity from taxation, being implied in the Constitution, could not be affected by a law passed by the Parliament. But the High Court held that the Act was valid and effective to make the salaries of Federal officers taxable by the States. The implied prohibition had its limitations. It was based on the necessity of preventing interference ; and that necessity had no application where the Federal Parliament consented to the tax, and declared it to be no interference.

### **Constitutional Cases Removed to High Court.**

The conflict between the High Court and the Privy Council remained. Its importance with regard to the particular question of the taxation of State salaries, was taken away by the Commonwealth Salaries Act ; but so long as cases, involving questions of the distribution of power between the Commonwealth and the State, might be taken on appeal from the State Supreme Courts to the Privy Council, passing by the High Court, such conflicts might at any time arise again. The Commonwealth Parliament met this difficulty by the Judiciary Act 1907, section 4, which has excluded the State Courts from jurisdiction in matters involving questions

as to the limits *inter se* of the constitutional powers of the Commonwealth and a State, or of a State and a State ; and provided, in the event of any such question arising in a State Supreme Court, for the removal of the case to the High Court : Judiciary Act 1903-10, section 40.

### State Imports.

The Commonwealth Customs Act 1901 is a valid exercise of the exclusive power vested in the Commonwealth to impose, collect and control duties of customs and excise conferred by the Constitution, secs. 52 (II.), 86 and 90. It applies to goods imported by the Government of a State as well as to those imported by private persons. Therefore, goods imported by a State, whether dutiable or not, are by sec. 30 of the Act subject to the control of the customs, and the authority of the State executive is no justification for their removal from that control contrary to the provisions of the Act. In 1908 a quantity of wire-netting, which had been purchased in England and imported into the Commonwealth by the Government of New South Wales, was landed at the port of Sydney. Without any entry having been made or passed, and without the authority of the customs officers, the defendant, acting under the authority of the executive Government of the State, removed the goods from the place where they were stored. It was held by the High Court that the defendant had committed a breach of the Customs Act, secs. 33 and 236. Judgment was entered for a penalty : *The King v. Sutton*, (1908) 5 C.L.R., 789 ; *Attorney-General for New South Wales v. Collector of Customs, New South Wales*, 5 C.L.R., 818 and (1909) A.C., 343.

### Expulsion and Deportation.

By the Pacific Islands Labourers Act 1901, section 8, a Court of summary jurisdiction upon being satisfied that a Pacific Island labourer is found in the Commonwealth may order his expulsion and deportation from Australia ; held to be a valid exercise of Federal power : *Robtelmes v Brennan*, (1906) 4 C.L.R., 395.

### Surplus Revenue.

Before the expiration of the Braddon Clause period under the Constitution, section 87, it was the right of the States under section 94 to have returned to them every month all surplus revenue of the Commonwealth which remained after paying or providing for

Commonwealth expenditure. In the case of *The State of New South Wales v. The Commonwealth*, (1908) 7 C.L.R., 179, it was held that when moneys are duly appropriated out of the Consolidated Revenue and allotted for special purposes (such as old age pensions or defence) they may be treated as Commonwealth expenditure in the taking of accounts and the ascertainment of surplus revenue; held, therefore that the Surplus Revenue Act 1908 is a valid exercise of Federal power.

### Trusts and Combines.

The Australian Industries Preservation Act so far as it forbids and penalizes trusts, combines and monopolies in restraint of interstate and external trade to the detriment of the public is a valid exercise of Federal power: *Huddart Parker & Co. Ltd. v. Moorehead*, (1909) 8 C.L.R., 330; *The Attorney-General of the Commonwealth v. The Associated Northern Collieries and the Adelaide S.S. Co. Ltd. and others*, (1911) 14 C.L.R., 387.

### The Union Badge.

The Commonwealth Court of Conciliation and Arbitration has jurisdiction to make an award on a claim by tramway employees upon their employer to wear visibly whilst on duty without liability to dismissal, a badge denoting membership of a duly registered organization: *Australian Tramway Employees' Union v. Brisbane Tramway Co. and The Adelaide Tram. Trust and others*, (1913) 17 C.L.R., 680.

### Land Taxation.

In *Osborne v. The Commonwealth*, (1911) 12 C.L.R., 230, the plaintiff sought a declaration that the progressive Federal Land Tax Act 1910, on unimproved values was not in substance an exercise of the taxing power of the Commonwealth, but an attempt to regulate the holding of land in the Commonwealth, which it was contended was *ultra vires* of the Parliament. It was alleged that the Act was an attempt to exercise powers exclusively reserved to the States, including the control of land, domestic trade, police and industrial matters. The High Court upheld the Tax Act. Assuming that the taxation which the Act imposed was drastic, as was alleged, the Court held that it was not its function to say that drastic taxation of landed interests would prevent residents from owning large areas, or would prevent absentee land owners from residing

out of Australia or from holding land within Australia. It was not a function of the Court to say what inducement to abstain from doing these things amounted to a prevention of doing them. Such alleged objects were not to be collected from the terms of the Legislation itself. Then, assuming that such doings existed they would not alter the construction of the Act, or make it less an exercise of the taxing power: 12 C.L.R., at p. 345. The basic reason of the decision was that the Tax Act was within or "under the Constitution" and that it did not conflict with any exclusive or reserve power of the States.

This case should be compared with *The King v. Barger*, (1908) 6 C.L.R., 41, where the Commonwealth Excise Tariff Act (1906) was challenged on the grounds that it was indirectly an attempt to regulate and control wages conditions in the agricultural implement making industry. The majority of the Court *per* GRIFFITH, C.J., BARTON, and O'CONNOR, JJ., ISAACS and HIGGINS, JJ. dissenting, held that the Act amounted to an interference with the domestic affairs and employment and wages conditions of the States and was not in reality a taxing Act. The power of taxation cannot be exercised so as to operate as a direct interference with the domestic affairs of the States in any particular. The selection of a particular class of goods produced in Australia for taxation, by a method which made the liability to taxation dependent upon the conditions to be observed in the industry in which they were produced, was, in the opinion of the majority of the Court, as much an attempt to regulate those conditions as if the regulations were made by a distinct enactment.

### **Taxation of Crown Lands.**

The Commonwealth Land Tax Assessment Act 1910-1914, in so far as it purports by section 29 to impose land tax upon leasehold estates in Crown lands, is not invalid under the Colonial Laws Validity Act 1865, as being repugnant to the Imperial Acts which confer upon the Legislatures of the several States powers of legislation with respect to waste lands of the Crown in those States respectively: neither is it invalid under section 114 of the Constitution, as imposing a tax upon State property, or as infringing the rule laid down in *D'Emden v. Pedder*, 1 C.L.R., 91. *The Attorney-General (Queensland) v. Attorney-General of the Commonwealth*, (1916) 20 C.L.R., 148.

**Inquisitorial Powers of the Customs Department.**

The Australian Industries Preservation Act (1906), section 15 (b) passed by the Commonwealth Parliament in the exercise of its power over trade and commerce with other countries and among the States, authorizes the Controller-General of Customs to make inquiries as to suspected offences against the commerce law, and if an offence is suspected he may by writing under his hand require any person to give information relating to the alleged offence, and to produce documents. William Thomas Appleton, the manager of Huddart, Parker & Co. Ltd. was convicted and fined £5 for refusing to answer such questions. He appealed to the High Court, challenging the validity of section 15 (b) on the ground that it authorizes compulsory discovery in aid of criminal proceedings, and that as such offences came within the judicial functions of Courts having Federal jurisdiction could not be handed over to the head of a department to deal with : Constitution, section 71 ; that the compulsory examination of suspected persons was inconsistent with the right of trial by jury : Constitution, section 80. The High Court over-ruled these objections, sustained the law and the conviction thereunder : *Appleton v. Moorhead*, (1909) 8 C.L.R., 330.

**POWERS DENIED TO THE COMMONWEALTH.**

Since the establishment of the Commonwealth the provisions of a number of Commonwealth Acts have been reviewed by the High Court of Australia and pronounced unconstitutional and void on the grounds that they were in excess of Commonwealth powers. Two Commonwealth laws pronounced to be valid by the High Court have been declared to be *ultra vires* by the Privy Council. For a complete list of these cases, see chapter III., p. 77.

**State Railways.**

The Commonwealth Conciliation and Arbitration Act 1904, section 4, purported to give to the Conciliation and Arbitration Court jurisdiction to deal with any industrial dispute "in relation to employment on State railways." This was a deliberate and designed attempt on the part of the Commonwealth to interfere in the management of State railways. In the case of the *Federated Amalgamated Government Railway and Tramway Service Association v. New South Wales Railway Traffic Employees Association*, (1906) 4 C.L.R., 488, the High Court held that this section, so far as it purported to affect

State railways, was *ultra vires* and void, and, consequently, that an organization consisting solely of employees on State railways was not entitled to be registered under that Act. The ground of the decision was that the section embodied an attempt on the part of the Commonwealth to control a State instrumentality or agency in the shape of State railways, and the Constitution does not either expressly or by necessary implication authorize such an attempt.

### **Appeal to Privy Council.**

The Commonwealth has no power to pass a law taking away the right to appeal from State Supreme Court to the Privy Council: *Webb v. Oultrim*, (1907) App. Cas., 81 and 4 C.L.R., 356. But see now the Judiciary Act 1903-10, section 40, giving the High Court exclusive jurisdiction in constitutional cases.

### **Trading Corporations.**

The Commonwealth cannot pass a law invalidating contracts made by corporations engaged in the internal trade and commerce of a State: *Huddart Parker & Co. v. Moorhead and Others*, (1908-9) 8 C.L.R., 330.

### **Excise Duties to Regulate Wages.**

The Commonwealth Excise Act 1906, No. 16, provided that if the manufacturers of certain agricultural machinery did not pay to their employees fair and reasonable wages (to be determined by different methods) for work done in the production of such implements, the manufacturer should be liable to pay excise duties on such implements as specified in the schedule to the Act. In the case of *The King v. Barger*, and *The Commonwealth v. McKay*, (1908) 6 C.L.R., 41, a majority of the High Court (GRIFFITH, C.J., BARTON and O'CONNOR, JJ.) held that the Excise Tariff 1906 is not an Act imposing duties of excise, but is an act to regulate the conditions of manufacture of agricultural implements, and is therefore not an exercise of the power of taxation conferred by the Constitution. Even if it were otherwise within the competence of the Commonwealth Parliament to deal with the conditions of labour, the Act which if void, would have the effect of regulating the conditions of manufacture, would be invalid as dealing with matters other than duties of excise contrary to section 55 of the Constitution. Even if the term "taxation," uncontrolled by any context, were capable of including the indirect regulation of the domestic affairs

of the States by means of taxation, its meaning in the Constitution was limited by the implied prohibition against direct interference with matters reserved exclusively to the States. It was held, therefore (ISAACS and HIGGINS, JJ. dissenting), that the Act was invalid.

### Union Label.

The Commonwealth Trade Marks Act 1905, part VII. contained provision for the registration of what were described as "workers' trade marks," sometimes called the "union label." In the case of *The Attorney-General for New South Wales v. The Brewery Employees Union of New South Wales*, (1908) 6 C.L.R., 469, a majority of the High Court (GRIFFITH, C.J., BARTON and O'CONNOR, JJ.) held that the alleged "workers' trade marks" were not trade marks within the meaning of the Constitution, section 51 (XVIII.). Nor could the law be justified by the Federal power over trade and commerce. The power of Parliament does not extend to trade and commerce within a State, and consequently the power to legislate as to internal trade and commerce is reserved to the States, by section 107 of the Constitution, to the exclusion of the Commonwealth. When the intention to reserve any subject-matter to the States, to the exclusion of the Commonwealth, clearly appears, no exception should be admitted to that reservation which is not expressed in clear words: ISAACS and HIGGINS, JJ. dissenting.

### Internal State Trade and Contracts.

Much light was thrown on the proper method of interpretation of the Constitution of the Commonwealth by the legislation of Parliament and by the decisions of the High Court in a case arising out of two sections contained in the Australian Industries Preservation Act (1906) as amended by the Act of 1907. This Act was passed by Parliament in the exercise of its powers over "trade and commerce with other countries and among the States," Constitution, section 51 (I.) and "foreign corporations and trading or financial corporations formed within the limits of the Commonwealth": Constitution, section 51 (XX.). Sections 5 and 8 of the Act provided that if certain corporations entered into certain forbidden contracts, in restraint of trade within the State, they should be guilty of an offence. Huddart, Parker & Co. Ltd. was convicted of an offence against the Act and they appealed to the High Court, which *per* GRIFFITH, C.J., BARTON, O'CONNOR and HIGGINS, JJ. (ISAACS, J. dissenting) quashed



the conviction. The grounds of the majority judgment were that the laws challenged did not deal with corporations, but under the guise of laws relating to corporations attempted to regulate trade and commerce within the limits of the State and not relating to trade and commerce among the States ; that as such it was an invasion of the reserved powers of the States. Contracts made within the State not relating to inter-state trade were held to be governed exclusively by State laws. The words of the Constitution " corporations formed, etc., " were open to two constructions, but they ought not to be considered as authorizing the Commonwealth to invade the field of State law, as to domestic trade carried on by corporations under State laws. The appeal of Huddart, Parker & Co. Ltd. was therefore allowed and the conviction was quashed on the ground of the invalidity of the said sections : *Huddart, Parker & Co. Ltd. v. Moorhead*, (1909) 8 C.L.R., 330.

### State Wages Boards.

*The Bootmakers' Case (Australian Boot Trade Employees' Federation v. Whybrow & Co.)*, (1910) 10 C.L.R., 266, was interesting as illustrating the operation of clause V. This was a special case stated by the President of the Commonwealth Court of Conciliation (Mr. Justice HIGGINS) for the opinion of the High Court as to whether he had power to make an award which was inconsistent with a determination of a State wages board (see 4 C.A.R., 33). The High Court held (GRIFFITH, C.J. and BARTON and O'CONNOR, JJ., ISAACS and HIGGINS, JJ. dissenting) that " arbitration " meant arbitration in accordance with law, and that the Arbitration Court had no jurisdiction to make an award inconsistent with a State law. The determination of a State wages board might be a " law "—it depended on the nature of the State Act under which it was made. The test of inconsistency was whether compliance with the award was inconsistent with obedience to the State law ; the mere fact that the award fixed a higher rate of wages than the *minimum* required by State law did not make it inconsistent. Here was a case of distinct conflict between Federal and State laws. Which was to prevail ? It was contended in support of the award, that when an award of the Federal Arbitration Court was inconsistent with a State law the former must prevail, being a Federal law ; that although the Commonwealth Parliament has no power to interfere directly with the domestic, industrial or police powers of a State ; that although it cannot logically delegate the power which

it does not possess, yet it might, by appointing a Judge and calling him arbitrator, empower him to interfere. "How," it was asked "in the face of clause V. can an award be weakened, altered or abrogated by having its effect destroyed by any provision of State law?" The majority of the High Court held that any invasion by the Commonwealth of the sphere of the domestic concerns of the States appertaining to trade and commerce, or to the police powers of the States is forbidden by the Constitution except to the extent expressly authorized. The Court rejected the contention that although Parliament could not make a law inconsistent with State domestic laws within the reserved powers of the States, Parliament can appoint a judge or arbitrator to do what it cannot do itself.

### Common Wages Rule.

Another *Bootmakers' Case* (*Australian Boot Trade Employees Federation v. Whybrow & Co.*, (1910) 11 C.L.R., 311) was also interesting as showing the competition of Commonwealth and State laws. An application that the award in the bootmakers' dispute should be declared to be a common rule of the industry in five States of the Commonwealth having been made by the claimant Employees' Federation and opposed by a large number of employers in the industry, the President of the Court of Conciliation and Arbitration stated a case for the opinion of the High Court as to the validity of the common rule provision. The Commonwealth Conciliation and Arbitration Act, section 38 (f) and (g), gives the Court power to declare that any award which it makes shall be common rule in any industry in connection with a dispute. The common rule under section 38 (f) was to be made after the award settling the dispute; it was an order to be made irrespective of dispute, actual or threatened, and it was directed towards the preventing of unfair competition on the part of parties not bound by the award and towards the general regulation of wages, &c.—not towards the prevention or settlement of industrial disputes. A Full Court consisting of all the five justices held unanimously that the declaration of a common rule, binding not merely the parties to a dispute before the Court but the whole industry, was not industrial arbitration, but was the regulation of industrial matters by legislation, and therefore that the common rule provisions were *ultra vires* the Constitution; that section 51 (xxxv.) conferred on the Court no general legislative power to regulate Australian industries, but merely power to deal with certain phases of industrial matters by conciliation and

arbitration; that section 38 (f) the Court held, attempted to make a delegation of legislative authority to the Arbitration Court to deal with matters over which Parliament itself has no jurisdiction. In this case, therefore, the Commonwealth law was held to be invalid, not because of its inconsistency with any actual or existing State laws, but because it was not a law "within the Constitution" authorized by the Constitution to be passed by the Commonwealth Parliament, but that it encroached on the reserved or exclusive powers of the States.

### **Intra-State Navigation and Shipping.**

Another conspicuous illustration of the invalidity of a Commonwealth Act is afforded by the *Owners of the s.s. Kalibia*, (1910) 11 C.L.R., 695. Here a whole Act containing valid as well as invalid provisions, which were inseparable, was declared void and ineffectual. The Act in question was the Seamen's Compensation Act 1909. The issue of construction arose under section 4 of that Act which provided that it should apply to give compensation to seamen meeting with accidents in their employment on board ships engaged in the coasting trade. The term "coasting trade" is a familiar one and means trade between different parts of the same country using the word "country" in a political sense. The subject-matter of the Act, therefore, expressly included all the coasting trade of Australia which, within the limits of the States was extended from one State to another. The High Court in pronouncing the whole Act invalid, said it was not open to argument that the power to make laws with respect to trade and commerce "with other countries and among the States" does not authorize Parliament to legislate with respect to the internal trade of a State. Here the Commonwealth law was declared void not on the ground of inconsistency with any specific State law, but because it was in excess of the express grant of power, in other words, it was not a law "under the Constitution."

### **Civil Rights and Domestic Relations.**

The Commonwealth Parliament has no authority in the name of and under the guise of taxation to interfere with civil rights, or domestic relations; or to impose on a wife the obligation to pay her husband's debts or *vice versa*. It was so held by the High Court in the case of *Waterhouse and Wife v. The Deputy Commissioner of Taration*, 17 C.L.R., 665. Arthur Waterhouse having transferred

certain lands to his wife Laura Emily Waterhouse, for valuable and substantial consideration, the Deputy Commissioner taxed them as joint owners of the land under the Land Tax Assessment Act, section 36. They appealed to the High Court against the assessment. It was objected that the section, if valid, operated not as imposing land tax, but as imposing a liability upon one person to pay another person's debt, and that such an imposition was not within the powers of the Parliament enumerated in the Constitution. In the present case it was said that the subject-matter of taxation of a wife in respect to her husband's property, or of a husband in respect to a wife's property, was not the same subject-matter as the taxation of land. The provision attacked could not be supported on the ground that it was within the general power conferred by the Constitution to impose taxation in respect of matters other than land. It was contended for the Commissioner that husband and wife were in law and in fact one person, and that Parliament acting on this view, could impose on either an obligation to pay taxes due by the other.

The High Court held that the section was beyond the legislative powers of the Commonwealth, and invalid, because, amongst other things, it purported to impose a tax on persons who had no interest in the land in which the provision sought to render them liable.

The Chief Justice (Sir SAMUEL GRIFFITH) said that the fundamental proposition of the Commissioner that the husband and wife were in law and in fact, one person, was not correct, and no argument could be based upon it. In considering the validity of the Act, the Court had to have regard to the substance of the matter. There was no doubt that in substance section 36 was an attempt to impose pecuniary liability as a consequence of the transfer of land by a husband to his wife or by a wife to her husband, which was *pro tanto* imposing a restraint upon such dealings, and the simple question was whether Parliament had power to do so. The relations of husband and wife and the conditions of the transfer of land, as well between them as between them and other persons, were matters which by the Constitution were left to the States, and over which the Commonwealth Parliament had no authority. It was sought to support the section by the contention that in other words the collection was in the nature of a penalty. The penalty or obligation was not made dependent upon any evasion or attempted evasion of the Act, but upon the mere fact of transfer, which was a lawful Act,

and which Parliament had no power to declare unlawful. The fact that the Commissioner of Taxes had a dispensing power did not alter the plain construction of the words. The argument, therefore, did not help the Commissioner. There was a second objection to the validity of section 36, viz., that it was not a provision imposing taxation within section 55 of the Constitution Act. Even apart from section 55 of the Constitution Act, it was not in His Honor's judgment, within the competence of Parliament, having imposed a tax on the owners of land, to declare that persons who were not in any sense owners should be deemed to be owners for the purposes of the payment of the tax. "I cannot," observed his Honor, "find in the Constitution any power to declare that the true shall be regarded as false or the false regarded as true, except for the limited purpose of definition of a word or phrase which the Parliament used in dealing with a subject-matter wholly within its competence." For both these reasons His Honor was of opinion that section 36 was invalid, and the appeal was allowed. The other judges concurred: *Waterhouse v. Deputy Commissioner of Taxation*, (1914) 17 C.L.R., 665.

### **The Liberty of the Subject.**

In giving judgment in the Royal Commission case, the Privy Council, *per* HALDANE, L.C., said that none of the powers conferred on the Commonwealth Parliament by section 51 relate to that general control over the liberty of the subject which must be shown to be transferred if it is to be regarded as vested in the Commonwealth. It was, of course, true that, under that section, the Commonwealth Parliament could legislate about certain forms of trade, bounties, statistics, and trading corporations. Such legislation might possibly take the shape of Statutes requiring and compelling the giving of information about those subjects specifically. But this was not what the Commonwealth Royal Commissions Acts purported to do (1914) App. Cas., at p. 237; 17 C.L.R., 644.

### **Inquisitorial Power.**

The scope of the Commonwealth Royal Commissions Acts was not restricted to any particular subject of legislation or inquiry, and no legislation had actually been passed dealing with specific subjects such as those to which their Lordships had referred as matters to which legislation might have been directed giving sanction to some of the inquiries which the Royal Commissioners had been

making. And the field of the Royal Commissions Acts—which were to apply to any Royal Commission, where issued under statutory authority or under the common law powers of the Crown, went far beyond any of the first 36 of the classes of subjects enumerated in section 51 of the Constitution.

### **Incidental Power.**

In their Lordships' opinion, the question was not carried further by section 51 (xxxix.) of the Constitution which declares it to be within the legislative capacity of the Central Parliament matters incidental to the execution of any power vested by the Constitution in the Parliament, or in either House thereof, or in the Government of the Commonwealth, or in the Federal judicature, or in any department or officer of the Commonwealth. "These words," said Lord HALDANE, L.C. "do not seem to do more than cover matters which are incidents in the exercise of some actually existing power, conferred by Statute or by the common law."

The authority over the individual sought to be established by the Royal Commissions Acts, the new offences which they create, and the drastic powers which they confer, could not, in their Lordships' opinion, be said to be incidental to any power at present existing by Statute or at common law. A Royal Commission had not, by the laws of England, any title to compel answers from witnesses, and such a title was therefore not incidental to the execution of its powers under the common law. And until the Commonwealth Parliament had entrusted a Royal Commission with the statutory duty to inquire into a specific subject, legislation as to which had been, by the Federal Constitution of Australia assigned to the Commonwealth Parliament, that Parliament could not confer such powers as the Acts in question contained on the footing that they were incidental to inquiries which it might on a future day direct.

"Their Lordships do not think that the Royal Commissions Acts in the form in which they stand, could, without an amendment of the Constitution, be brought within the powers of the Commonwealth Legislature. Their Lordships hesitate to differ from judges with the special knowledge of the Australian Constitution which the learned judges of the High Court, and not the least the Chief Justice (Sir SAMUEL GRIFFITH) and Mr. Justice BARTON, possess, but the question they have to decide depends simply on the interpretation

of the language of an Act of Parliament, and in the present case they have formed a definite opinion as to the interpretation which must be placed on the words used. Without re-drafting the Royal Commissions Acts and altering them into a measure with a different purpose, it is, in their Lordships' opinion, impossible to use them as a justification for the steps which the Royal Commission on the sugar industry contemplates in order to make its inquiry effective. They think that these Acts were *ultra vires* and void, so far as they purported to enable a Royal Commission to compel answers generally to questions, or to order the production of documents, or otherwise to enforce compliance by the members of the public with its requisition": *Attorney-General of the Commonwealth v. Colonial Sugar Refining Co. Ltd.* Privy Council, (1914) App. Cas., at p. 237; 17 C.L.R., 644.

#### **Suggested Amendment.**

Their Lordships seemed to have been under the impression that no legislation had been passed by the Commonwealth Parliament dealing with subjects such as those which the Royal Commission on the sugar question was charged to investigate. Yet their attention might have been directed to the Customs Tariff Act 1908-11, in which duties of customs to the amount of £6 per ton were imposed on the importation of sugar, and to Acts dealing with excise duties, rebates and bounties on the local production of sugar. It was surely a proper and incidental right of the Commonwealth Government to cause inquiries to be made as to the effect of the customs duty on sugar, whether for revenue or protective purposes and to ascertain also, how the sugar excise and bounty laws once in operation and afterwards repealed had affected the growth and sale of sugar in Australia. These laws, some actual and existent, others repealed must certainly have involved the exercise of "actual and existing powers." It would have been contrary to the Constitution, section 55, to have included in a Customs Tariff Act a provision authorizing inquiries relating to the sugar industry. According to the judgment of the Privy Council, the only possible alternative, would have been to make special provision for inquiries by special Acts of Parliament apart from Tariff and Excise Acts. A special Act authorizing inquiries was passed in the form of the Royal Commissions Act 1902-12. That Act did not specify any particular subject matters for inquiry; it left those details to be settled by the Executive Government; surely it

could not have been expected that the Royal Commissions Act should have specified every item in the Tariff to be investigated so as to cover the whole field of taxation by customs and excise duties.

Contrasted with this decision of the Privy Council, stands the judgment of the High Court of Australia in *Appleton v. Moorehead*, (1909) 8 C.L.R., 330, *supra* p. 59; in which the inquisitorial discovery and interrogatory powers of the Customs Department under the Australian Industries Preservation Act 1906 were affirmed.

It is suggested that the technical defects in the drafting of the Royal Commissions Act, alleged by the Privy Council but not affirmed by the High Court, might be met by repealing and re-enacting the present Act and placing in a schedule annexed thereto, a list of Acts passed by the Commonwealth Parliament with respect to which it might be considered that inquiries should be made by Royal Commissions and providing for the addition by proclamation to such list of similar future Acts.

### § 13. "EVERY PART OF THE COMMONWEALTH."

#### **Territorial Basis of the Commonwealth.**

The Constitution and laws of the Commonwealth are in force within the territorial limits of the Commonwealth which are co-terminus with the boundaries of the States. It is doubtful whether admitted territories are parts of the Commonwealth before they become States. By the law of nations the territorial limits of a country are allowed to extend into every part of the open sea within one marine league from the coast, measured from low water mark. This coastal margin is called "territorial waters," or the "three-mile limit." There are only two provisions in the Constitution Act explicitly relating to the extra-territorial operation of laws. The first is in clause V., which makes the laws of the Commonwealth in force on British ships on round voyages between ports of the Commonwealth; the second is in section 51 (x.), which empowers the Federal Parliament to legislate as to "fisheries in Australian waters beyond territorial limits."

#### **Extra-Territorial Operation of Laws.**

The grant of powers of self-government to a component portion of the Empire connotes, primarily, restriction of their exercise to



the limits of the local territory, and its adjacent sea limit as recognized universally and by Statute: Territorial Waters Jurisdiction Act 1878, 41 & 42 Vict. c. 73.

It is difficult to see how the practical constitutional arrangement observed by the Imperial authorities could work harmoniously unless this were so. And therefore to the grant of powers to the self-governing communities of the Empire the maxim *Extra territorium jus dicenti impune haud paretur* primarily applies as it does to other Acts of British legislation. To extend the effect something must appear either from the express language or the necessary scope and intent of its operations as apparent on the face of the Statute. Whatever is necessarily incident to the proper exercise of a power passes with it as an implication: *Kielley v. Carson*, 4 Moo. P.C.C., 63; *Barton v. Taylor*, 11 App. Cas., 197; *Baxter v. Commissioners of Taxation (N.S.W.)*, 4 C.L.R., 1087, at pp. 1157 and 1158; *Attorney-General for Canada v. Cain*, (1906) A.C., 542; *Hudson v. Guestier*, 6 Cranch., 281; *The Ship "North" v. The King*, 37 Can. S.C.R., 385. These cases are examples of accessory incidence attached by necessary implication to main powers, even where the accessory powers require extra-territorial application; but they are clearly to be distinguished from any authority to claim additional main powers: *Per ISAACS, J. in the Merchants Service Guild of Australasia v. The Commonwealth Steamship Owners Association*, (1913) 16 C.L.R., at p. 690.

The principle of the limited territorial jurisdiction of a Colonial Legislature was clearly affirmed by the Privy Council in the leading case of *MacLeod v. Attorney-General for New South Wales*, 60 L.J.P.C., 55; (1891 A.C., 455), where it was held that the words of the New South Wales Criminal Law Amendment Act 1883 that "whosoever being married marries another person during the life of the former husband or wife wheresoever such second marriage takes place shall be liable to penal servitude for seven years," must be intended to apply to those actually within the jurisdiction of the Legislature and consequently that there was no jurisdiction in the Colony to try the appellant for the offence of bigamy alleged to have been committed in the United States of America.

#### **Customs Law—Entering a Port with Customs Seal Broken.**

The Commonwealth Customs Act 1901 (sections 190, 191, 192), authorize a customs officer to board ships entering Commonwealth

waters from ports beyond the seas; lock up and place under seal any dutiable goods not entered for home consumption. No such seal or lock can be broken without authority. If any ship enters an Australian port with any such lock or seal broken, contrary to law, the master is deemed guilty of an offence and is liable to a penalty. The validity of this law was tested in the case of *Kingston v. Gadd*, (1902) 27 V.L.R., 417; 23 A.L.T., 152; 7 A.L.R., 265. This was an action by the Commonwealth Minister of Customs against the Master of the s.s. *Oceana* to recover penalties for breach of the Act. The facts alleged and admitted were, that on 15th November 1902 the ship left the port of Sydney for Melbourne having on board certain dutiable stores sealed and secured. On the voyage between the above ports, when the ship was on the high seas, and at a distance of more than ten miles from land, the defendant as master, caused the doors, hatchways, and openings of the holds and lockups, and lazarettes aforesaid to be opened and the seals securing the same to be broken.

Between the above ports on her said voyage, and afterwards during the ship's stay in the port of Melbourne, the stores aforesaid were, by direction of the defendant as master, used by the passengers and crew and for the service of the ship. The ship arrived from Sydney at the port of Melbourne on her said voyage on or about the 18th day of November, 1901, having the seals placed on the doors, hatchways and openings by the proper official of customs at the port of Sydney as hereinbefore stated, broken without the authority of an officer of customs.

On behalf of the defendant it was contended that so much of the said section as purports to impose the said penalty upon any ship entering any port with her seals broken—such seals being broken more than ten miles from land on the high seas—is void and of no effect and *ultra vires* as aforesaid.

The Full Court of Victoria (WILLIAMS, HOLROYD and HOOD, JJ.) affirmed the validity of the section and gave judgment for the Commonwealth. The same question was raised in the case of *Kingston v. P. & O. Steam Navigation Co.*, which went to the Privy Council, (1903) App. Cas., 471. Their Lordships approved of the decision of the Full Court of Victoria in *Kingston v. Gadd*; holding that section 192 is not *ultra vires* of the Constitution in respect of seal being broken in the high seas outside the jurisdiction of the Commonwealth.

**Expulsion and Deportation from the Commonwealth.**

The question of the extra-territorial operation of Federal laws in connection with the expulsion and deportation of alien residents of the Commonwealth was considered by the High Court in the case of *Robtelmes v. Brenen*, (1906) 4 C.L.R., 395. It is an attribute of sovereignty that every State is entitled to decide what aliens shall or shall not become members of its community. The right of a nation to expel or deport foreigners from the country is as unqualified and undeniable as the right to exclude them from entering the country, whether they are alien friends or enemies. This power has been delegated by the Imperial authority to the Commonwealth Parliament by virtue of the Constitution, section 51, which gave the Parliament full authority to legislate as a sovereign body on the subject of (*inter alia*) "naturalization and aliens."

Under the Federal Pacific Islands Labourers Act 1901, section 8 a Court of summary jurisdiction, upon being satisfied that a Pacific Island labourer, found in the Commonwealth before 31st December 1906, and reasonably supposed not to be employed under agreement, is not or has not been so employed for a month past, may order his deportation from Australia. Robtelmes, a Kanaka labourer who had been introduced into Queensland under the special conditions of a pre-federation State Act was after the passing of the Federal Act brought before a police magistrate, who declared himself satisfied, and ordered his deportation.

The High Court held that the right to expel involved the right to do all things necessary to make the expulsion effective, among which was necessarily included the act of deportation, to the extent of the complete extrusion of the alien from the territorial borders of the State. The extra-territorial constraint necessarily consequent upon the act of expulsion was immaterial to the validity of the right of deportation. Held further, that the right of expulsion was not limited to ordering the deportation of the alien to the place whence he came; the right was general and unlimited, and could be exercised by the deporting State in whatever manner and to whatever place was necessary for effective deportation: *Robtelmes v. Brenen*, (1906) 4 C.L.R., 395.

**Surrender of Fugitive Offenders.**

It is probable that the Federal Parliament has under section 51 (xxix.) (external affairs) power to make laws under section 32 of

the Fugitive Offenders (Imperial) Act 1881 as to deal with the surrender of fugitive criminals between the Commonwealth and other parts of the British Dominions: *McKelvey v. Meagher*, (1906) 4 C.L.R., at p. 278.

### **Arbitration Court Awards Operative on the High Seas.**

In the arbitration case of *Merchant Service Guild v. The Commonwealth Steamship Owners Association*, (1913) 17 C.L.R., the High Court decided that the award of the Commonwealth Conciliation and Arbitration Court in a marine industrial dispute extending beyond the limit of any one State could by virtue of covering clause V. be made binding and effective on Australian ships trading between Australia and the South Seas: see (1) "British Ships."

### **Territorial Limits.**

The jurisdiction of the Federal Courts must, of course, be confined within the territorial limits over which the laws of the Commonwealth extend and it is conceded that, apart from the provisions of the covering clause V. of the Constitution those laws can have no operation beyond the three miles sea limit around the Commonwealth territory: *Per O'CONNOR, J.* in the *Merchants Service Guild of Australasia v. Archibald Currie & Co. Proprietary Ltd.*, (1908) 5 C.L.R., at p. 744.

## **§ 14. "NOTWITHSTANDING ANYTHING IN THE LAWS OF ANY STATE."**

### **Where State Laws Prevail.**

By the force of the words in clause V. "all laws made by the Parliament" coupled with section 109 where powers are concurrently vested in the Commonwealth and in the States, such, for instance, as patents, copyright, legal tender, weights and measure, etc., in case of conflict or inconsistency between the two sets of laws the Commonwealth law prevails over the State law, and the State law, to the extent of inconsistency, is invalid. The combined mandate of this clause "all law made by the Parliament" and section 109, relate to concurrent powers only, that is competing powers on the same level or the same plane. It cannot refer to powers contained in "this Act" which are exclusively invested in the Commonwealth or to powers which are exclusively reserved to the States by section

107. It cannot refer to powers which are expressly or by necessary implication either denied to the Commonwealth or denied to the States.

### STATE IMMUNITIES AFFIRMED.

#### State Bonds.

Bonds required to be given by the State of Illinois and City of Chicago on a condition precedent to the issue of a liquor licence were held by the Supreme Court of the United States to be exempt from the requirements of the Federal Stamp Tax Act 1898 (30 Statute at Large 448, Chap., 448) either as laws issued by a State or City within the meaning of the exemption conferred by section 17 of that Act or by virtue of that section ; that it was thereby intended to exempt the State and municipalities in respect of the exercise of strictly governmental functions : *Per FULLER, C.J.* " The general principle is that as the means and instrumentalities employed by the general government to carry into operation the powers granted to it are exempt from taxation by the States, so are those of the States exempt from taxation by the general government. It rests on the law of self-preservation, for any government, whose means employed in conducting its strictly governmental functions are subject to the control of another and distinct government exists at the mercy of the latter " : *Ambrosini v. United States*, (1902) 187 U.S., at p. 1.

#### State Railways.

The Federal Parliament cannot pass a valid law giving the Commonwealth Court of Conciliation and Arbitration jurisdiction to make industrial awards regulating the labour and employment conditions on State railways. Subject to the Constitution, section 51 (xxxii.), the control and management of such instrumentalities are exclusively vested in the States : *Federated Amalgamated Government Railway and Tramway Service Association v. New South Wales Railway Traffic Employees Association*, (1906) 4 C.L.R., 489.

#### State Water Supply Board.

The Board of Water Supply and Sewerage, Sydney, is in the strictest sense a department of the State Government. The receipts go into the Consolidated Revenue and its disbursements are defrayed out of that fund. It has been held, therefore, that this Board is

exempt from the jurisdiction of the Commonwealth Arbitration Court: *Federated Engine-Drivers' and Firemen's Association of Australia v. Broken Hill Proprietary Co. Ltd.*, (1911) 12 C.L.R., 398.

### State Municipal Instrumentalities.

The Commonwealth Parliament cannot pass any law which will impede or interfere with State municipalities established by State law exercising the functions of local self-government. Those are functions which are vested in such bodies to carry on for the benefit of the community, as opposed to private benefit. If the Government, by its agency, take control of such a matter as electric supply and uses it for the public benefit, it is a government function. The only test of what is a government function is, has the government taken upon itself to do the thing for the benefit of the community? In the American Courts, municipalities, speaking generally, have been treated as carrying on their public services as instrumentalities of the State which gives them their corporate existence. The cases of *Meriwether v. Garrett*, 102 U.S., 472 and *United States v. Railroad Company*, 17 Wall., 322, have broadly laid down the principle that a municipal corporation is a portion of the governing power of the State, and that any attempt to control or interfere with its functions is an attempt to interfere and control the State itself.

Until the decision of the Supreme Court of United States in *South Carolina v. United States*, 199 U.S., 437, it had always been considered that Congress had no constitutional authority to tax the funds of a State municipality. The whole basis of the doctrine that there is an implied prohibition against the Commonwealth exercising control over an instrumentality of a State Government, or a State exercising control over an instrumentality of the Commonwealth Government, is founded on an implication necessary for the preservation of the rights of Commonwealth and State within the ambit of their respective powers. In that case, however, a distinction was drawn between municipalities performing Government functions strictly so called and those engaging in municipal trading such as buying and selling of goods and the rendering of services for valuable consideration in competition with private manufacturers, traders and contractors.

It was held that the exemption of State agencies and instrumentalities from national taxation is limited to those which are of a

strictly governmental character, and does not extend to those employed by a State in carrying on an ordinary private business. In that case the sale of intoxicating liquor was the business of which the State in the exercise of its governing power had taken charge. It was held by the Supreme Court that the licence taxes charged by the Federal Government upon persons selling liquor were not invalidated by the fact that they were agents of the State, which had itself engaged in that business. This decision was recognized in *Murray v. Wilson Distillery Co.*, (1909) 213 U.S., 151.

The distinction drawn in *South Carolina v. United States* was applied in the *Federated Engine-Drivers' and Firemen's Association v. Broken Hill Proprietary Ltd.*, (1911) 12 C.L.R., 398, where it was held that the Sydney Board of Water Supply and Sewerage which was established by State law, for certain definite governmental functions was a body for a practical purpose identified with a State Government, that is the Crown, and that therefore it was not subject to jurisdiction of the Commonwealth Arbitration Court. On the other hand the Melbourne City Council which claimed similar immunity was held to stand in a different position. It was primarily constituted for the purposes of municipal government, and in respect of its functions of legislation and administration may be said to be a subordinate local agent for the purposes of government.

The corporation also engaged in the business of generating electricity as a power and light, and supplied it to the public in the ordinary course of trade and business for a profit. For that reason the Melbourne City Council like the South Carolina State Dispensary was held liable to Federal law and was therefore bound to comply with the determination of the Commonwealth Arbitration Court as regards employment conditions, wages, and hours of labour. "I express no opinion" said GRIFFITH, C.J. "upon the grave and difficult question of how far, if at all, the doctrines which have been laid down in the United States of America on this subject should be regarded as implicitly adopted by the Constitution of the Commonwealth. But as at present advised I see no serious reason for doubting that, if a municipal corporation chooses to engage in what has lately been called 'municipal trading,' and join the ranks of employers in industries, it is liable to the same Federal laws as other employers engaged in the same industries. This limitation is, indeed, I think, generally accepted in the

United States : see *South Carolina v. United States*, 199 U.S., 437, and the decisions of the Supreme Court of New York and Pennsylvania cited in that case " : (1911) 12 C.L.R., at p. 398.

The question whether municipal bodies are immune from the interference of Federal authority established under the Constitution, section 51 (xxxv.) was re-argued before the High Court in the municipalities' case heard in October 1918. The argument depended to some extent upon an inquiry into the true relationship of the municipality to the central Government of the State, but to a greater extent upon the definition of the true limits of the general rule of immunity. On this branch of the case the High Court reserved its judgment.

The remaining arguments which stand adjourned are that (1) from its very nature a municipal corporation exercising " non-trading " functions cannot be party to an industrial dispute ; (2) that an association of assorted employees of municipalities cannot be engaged in " an industry."

### WAIVER OF STATE IMMUNITIES.

#### Commonwealth Taxation of State Salaries.

In December 1915, the Victorian Parliament passed an Act, No. 2809, declaring that taxation by the Commonwealth in common with other salaries earned within the Commonwealth of the official salaries of officers of the State of Victoria residing in the State, and the salaries of and reimbursements of expenses to responsible Ministers of the Crown, the President and Chairman of Committees of the Legislative Council, the Speaker and Chairman of Committees of the Legislative Assembly and the members of either House of Parliament, who receive from the Consolidated Revenue any salary or reimbursement of expenses, shall not be deemed to be an interference with the exercise of any power of the State. Similar acts have been passed in New South Wales, Queensland, Tasmania and other States.

### STATE POWERS AFFIRMED.

#### Brewers' Licences.

Notwithstanding the provisions of the Constitution, sections 86 and 90, giving the Federal Parliament exclusive control over duties of excise the State Parliaments may still collect brewers'



licence fees. Such licence fees, are not duties of excise. Their imposition is within the police power of the States reserved to the States by section 107 including the regulation and supervision of internal trade: *Peterswald v. Bartley*, (1903) 1 C.L.R., 497.

### **Intra-State Shipping and Navigation.**

A State has, by section 107, exclusive authority to pass laws regulating shipping and navigation in and upon the rivers, ports, harbours, and the territorial waters of a State, determining the rights and liabilities of those engaged in such callings or business. A Commonwealth law purporting to regulate such shipping and navigation was held to be invalid.: *Owners of the S.S. Kalibia v. Wilson*, (1910) 11 C.L.R., 689.

### **Surrender of Fugitive Offenders.**

Pending Commonwealth legislation the laws passed by the Australian Colonies prior to Federation under the powers conferred by the Fugitive Offenders (Imperial) Act 1881, section 32, defining surrender, offences and procedure for the rendition of fugitive offenders between the Australian Colonies and other British dominions remain in force by virtue of the Constitution, section 108, and the States are still "British possessions" within the meaning and for the purposes of the Imperial Act: *McKelvey v. Meagher*, (1906) 4 C.L.R., 278.

### **The Union Label.**

The Commonwealth Trade Mark Act, Part VII., authorizing the registration of and giving proprietary rights in a worker's label, is in substance an attempt to regulate the internal trade and commerce of the States. The power to legislate respecting such internal trade and commerce is by the Constitution, section 107, reserved to the States to the exclusion of the Commonwealth: *Attorney-General of New South Wales v. The Brewery Employees Union of New South Wales*, (1908) 6 C.L.R., at p. 469.

### **State Labour Conditions.**

The Commonwealth power of taxation cannot be used in an indirect manner to interfere with or regulate the internal, industrial and domestic affairs of the States reserved to the States by section 107: *The King v. Barger* and *The Commonwealth v. McKay*, (1908) 6 C.L.R., 42.

### State Wages Boards.

The Commonwealth Court of Conciliation and Arbitration has no power to make an enforceable award which is inconsistent with the determination of a State Wages Board empowered by State statute law under section 107 of the Constitution to fix a minimum rate of wages. In cases of inconsistency a determination of a State wages board would prevail over an award by the Federal tribunal.: *Federated Saw-Mill Association v. James Moore and Others*, (1909) 8 C.L.R., 465; *Australian Boot Trade Employees Federation v. Whybrow and Others*, (1910) 10 C.L.R., 266.

### Common Wages Rule.

The Commonwealth Court of Conciliation and Arbitration has no power to make a common rule or regulation of industrial conditions binding persons not parties to a dispute. Such a rule operative within a State can only be made by State law under section 107: *The King v. The Commonwealth Court of Conciliation and Arbitration*; *Ex parte Whybrow and Others*, (1910) 11 C.L.R., at p. 1; *Australian Boot Trade Employees Federation v. Whybrow and Others*, (1910) 11 C.L.R., 311.

### The Law of Personal Property.

A State Parliament can pass laws authorizing a State Government to take possession of and appropriate to public use the private property of persons resident within its jurisdiction. In other words it is one of the reserved powers of the State under section 107 to expropriate private property and nationalise such property for State purposes. *The State of New South Wales v Commonwealth*, (1915) 20 C.L.R., 55 affirming the validity of the Wheat Acquisition Act 1914.

A State Parliament without actually expropriating personal property can pass a law directing it to be held to the order and subject to the dispositions and direction of a State Minister forbidding its sale or removal from its location without the ministerial consent thereby depriving it of its quality of negotiability: *Duncan v. State of Queensland*, ((1916) 22 C.L.R., 557), affirming the validity of the Queensland Meat Supply for Imperial Uses Act 1915.

### POWERS DENIED TO THE STATES.

#### Discriminating State Wine Licences.

By the Wine Beer and Spirit Act of Western Australia a licence fee of £2 per year is charged for authority to sell wine, the product of fruit grown in Western Australia whilst a fee of £50 per year is charged for the one licence that would authorize the sale of wine not the product of fruit grown in Western Australia. The holder of a £2 licence having sold wine the product of fruit grown in Victoria was prosecuted for selling without a licence. The magistrate having dismissed the case an appeal was brought into the High Court. It was held that the State law requiring a greater fee to be paid for the sale of one Australian wine than another was contrary to the provisions of section 92 of the Constitution, and was, therefore, to the extent at least of the difference between the fees so required to be paid, invalid : *Fox v. Robbins*, (1908-9) 8 C.L.R., 115.

#### Inter-state Trade, Travel and Intercourse.

The States cannot in the pretended exercise of reserved police powers pass laws interfering with or in any way impairing the freedom of trade, traffic and intercourse between the States guaranteed by the Constitution, section 92. Hence the Influx of Criminals Prevention Act 1903 (N.S.W.), section 3 making it a punishable offence for certain persons convicted of offences in another State to enter New South Wales before the lapse of three years after the termination of any imprisonment suffered by them in respect of such offences was held to be invalid being contrary to section 92 of the Constitution : *The King v. Smithers* ; *Ex parte Benson*, (1913) 16 C.L.R., 99.

The absolute freedom of inter-state trade, commerce, travel and transit is secured by the Constitution, section 92, and neither the Commonwealth nor the States can pass any laws impairing that freedom. Hence a law of the State of New South Wales making it an offence for certain convicted persons under certain conditions to enter that State was held to be *ultra vires* : *The King v. Smithers* ; *Ex parte Benson*, (1912) 16 C.L.R., 99.

The police power of the States, including the right to exclude persons whom they think undesirable inhabitants, has not been taken away under the Federal system, but it has been cut down to some extent both by the fact of union as well as under the operation

of the Constitution, sections 92-117. It is limited to cases of necessity to make laws for the promotion of public safety, order and morals : *Per* GRIFFITH C.J. and BARTON, J. in *The King v. Smithers* ; *Ex parte Benson*, (1912) 16 C.L.R., 109. The States have no power to pass laws preventing the free passage of persons from one State into or through another State. Trade, commerce and intercourse between the States is under section 92 absolutely free. Intercourse includes the right of travel and transit : *Per* ISAACS, J. and HIGGINS, J., at pp. 111-117.

### Severability of Invalid Parts of Laws.

Where a Federal or a State Act contains clauses which go beyond the legislative powers of the Parliament which passed it, the question arises whether the invalidity of parts affect the whole Act, or only so much of it as is outside the power. The answer given by the High Court of Australia, as by the Supreme Court of the United States, is that if the invalid part or parts are plainly severable from the rest of the Act, the validity of the rest of the Act is not affected ; but if the invalid part is not plainly separable the whole Act is invalid : *Federated Amalgamated Government Railway and Tramway Service Association v. New South Wales Railway Traffic Employees Association*, 4 C.L.R., at p. 546 ; citing *United States v. Reese*, (1875) 92 U.S., 214 ; *Trade Mark Cases*, 100 U.S., 82.

### Test of Severability.

What then is the test of severability, and how is it to be applied ? These questions have been dealt with in a series of judgments, in which the American cases were discussed, and the test formulated is as follows :—" Whether the Statute, with the invalid portions omitted, would be substantially a different law, as to the subject matter dealt with by what remains, from what it would be with the omitted portions forming part of it " (*Per* GRIFFITH, C.J.) *The King v. The Commonwealth Court of Conciliation and Arbitration* ; *Ex parte Whybrow*, 11 C.L.R., at p. 26.

In *The Federated Amalgamated Government Railway Employees Case*, 4 C.L.R., 488, the question was whether an association of State Railway servants could be registered as an organization under the Commonwealth Conciliation and Arbitration Act 1904, or whether that Act. so far as it purported to affect State railways,

was invalid. The only reference in the Act to State railways was in the definition of "industrial dispute" in section 4, which contained the words "including disputes in relation to employment upon State railways." The High Court held that these words went beyond the power of the Parliament, because State railways were State instrumentalities, and beyond the control of the Federal Parliament except in relation to inter-state commerce and defence : Sections 51 (xxxii.) and 98. It was not suggested that the provision as to State railways was not severable from the rest of the Act, or that the Act as a whole was invalid. But the question of severability was raised in another way. It was suggested, for the respondent association, that the provision as to State railways was in itself severable, and was (1) valid in its application to inter-state trade and commerce, even if not valid as to trade and commerce as a whole, and was (2) valid as to conciliation, even if not valid as to compulsory arbitration. But the Court held that, the application of the Act by section 4 to State railways generally being bad in part and unseverable, the section must fail as a whole.

In *The King v. Barger*, 6 C.L.R., 41, one ground on which the majority of the High Court held the Excise Act 1906 to be invalid was that it provided four conditions of exemption from the tax, of which three were held to be bad as discriminating between States or parts of States contrary to the Constitution, section 99. The Chief Justice, Sir SAMUEL GRIFFITH, delivering the judgment of himself, Mr. Justice BARTON and Mr. Justice O'CONNOR, said :—

"It was suggested that any condition which is obnoxious to the prohibition against discrimination may be rejected and the others enforced. But this would be to make the incidence of the tax depend upon conditions different from those prescribed by Parliament—'to make a new law, not to enforce the old one.'": *Per GRIFFITH, C.J.*, 6 C.L.R., at pp. 80, 81.

In *The King v. The Commonwealth Court of Conciliation and Arbitration*; *Ex parte Whybrow*, 11 C.L.R., 1, the validity of the Commonwealth Conciliation and Arbitration Act 1904 was assailed on the ground (amongst others) that the provisions of paragraphs (f) and (g) of section 38, which purported to empower the Court to declare the terms of an award to be a common rule of the industry, were invalid as giving the Court legislative, not arbitral, power, and were so interwoven with the whole scheme of the Act as to be

inseverable from it. The Court (*per* GRIFFITH, C.J., BARTON, O'CONNOR and ISAACS, JJ.) without pronouncing on the validity of the common rule, decided unanimously that it was severable from the rest of the Act.

In *Owners of the "Kalibia" v. Wilson*, (1910) 11 C.L.R., 697, the High Court held that the invalid portions of the Seamen's Compensation Act 1909 were so intimately bound up with the valid as to be inseverable, and that the whole must therefore fail.

### § 15. "ON ALL BRITISH SHIPS."

#### Meaning of Term.

The term "British ships" is used in what COCKBURN, C.J., in *Union Bank of London v. Lenanton*, 3 C.P.D., 234, at p. 247, called "the larger sense of the term," because, as BRETT, L.J., 3 C.P.D., 243, at p. 249, observed of the ship there in question, "she belonged solely to British owners." "British ship" means either a public ship, or a private ship belonging to British subjects, including in that term a British corporation. (See *R. v. Arnud*, 9 Q.B., 806; *Chartered Mercantile Bank of India v. Netherlands India Steam Navigation Co.*, 10 Q.B.D., 521, at pp. 535-6; *R. v. Bjornsen*, 10 Cox C.C., 74; 34 L.J.M.C., 180; *R. v. Allen*, 10 Cox C.C., 405. The breadth of the expression "all British ships" is shown by the exception of "The Queen's ships of war." *Per* ISAACS, J. in *The Merchant Service Guild of Australasia v. The Commonwealth Steamship Owners' Association*, (1913) 16 C.L.R., at p. 693.

#### Acts done on the High Seas.

By the Commonwealth Customs Act 1901, section 127 ships' stores are only to be used (except as prescribed) for passengers and crew and for the ship's service after her departure from her last port of departure in the Commonwealth, and a penalty is attached to breach of the section. By section 192 goods sealed by a customs officer are not to be opened without authority, and if a ship enters a port with such seal broken, the master is liable to a penalty. Where such seals are broken between the arrival of a vessel in one Australian port and her arrival in another, both penalties are incurred whether or not they were broken in territorial waters or on the High Seas. Section 192 is not *ultra vires* the Commonwealth in respect of seals being broken on the High Seas and outside its jurisdiction: *Kingston v. Gadd*, (1902) 27 V.L.R., 417; *P. & O. Steam Navigation Co. v. Kingston*, (1903) App. Cas., 471.

### Arbitration Awards.

Federal legislation under the Constitution, section 51 (xxxv.), authorizes the President of the Conciliation and Arbitration Court to make an award for the settlement of industrial disputes extending beyond the limits of any one State. In the arbitration case of *The Merchant Service Guild of Australasia v. The Commonwealth Steamship Owners' Association and Others*, (1913) 16 C.L.R., 664, the claimant Union sought an award for increased wages on board the steamers, *Foina* and *Wonganella* whilst on voyages engaged in trading between Australia and the South Seas. The President stated a case for the opinion of the High Court asking the following questions :—

(1) On the facts stated, is the dispute a dispute extending beyond the limits of any one State within the meaning of the Act and Constitution ?

(2) Assuming question 1 to be answered in the affirmative, and if the Court should see fit to impose duties to be observed on board the said ships when outside Australia, are the conditions enforceable by penalty (whether by virtue of section 5 of the Commonwealth of Australia Constitution Act or otherwise) ?

(3) Assuming the first question to be answered in the affirmative, and if the Court cannot procure an amicable agreement under section 3, has the Court power by award compulsorily to fix the hours and conditions to be incorporated (or deemed to be incorporated) in agreements of service made by the respondents with members of the claimant organization ?

The main point was whether the President could by virtue of the Constitution covering clause V. and section 51 (xxxv.) make an award binding the owners of the steamers to observe industrial conditions laid down by him between them and their employees when their ships were outside the territorial waters of the Commonwealth and upon the High Seas. There was also the mixed question of law and fact involved, viz. :— Whether those ships were within covering clause V ? Were they ships whose first port of clearance and last port of call was within the Commonwealth ? The High Court (*per* BARTON, Acting C.J. and ISAACS, HIGGINS, DUFFY, RICH and POWERS, JJ., GRIFFITH, C.J. being absent from the Commonwealth) held in effect, as to the first question, that a dispute does not cease to be a dispute extending beyond the limits of any one State merely because the operations in respect of which it takes place are carried on apparently outside the jurisdiction. The majority of the High Court declined to answer the question put by the President for direction in law as to whether penalties may be imposed for breach of terms of an industrial award applying to operations

beyond territorial limits but it was held that the Arbitration Court has power to require that any terms and conditions which it decides should be in operation between the parties shall be incorporated in a written agreement between them : *The Merchants Service Guild of Australasia v. The Commonwealth Steamship Owners' Association*, (1913) 16 C.L.R., 664.

### § 16. "FIRST PORT OF CLEARANCE AND PORT OF DESTINATION."

#### Extra-territorial Operation of Law.

In the case of *The Merchant Service Guild of Australasia v. Archibald Currie & Co.*, (1908) 5 C.L.R., 737, a plaint was lodged in the Commonwealth Court of Conciliation and Arbitration claiming an award, as against the respondents with respect to the wages, hours and conditions of labour of officers in their employment. The respondents were Archibald Currie & Co., individuals residing in Melbourne, and Archibald Currie and Co. Proprietary Limited, a joint stock company registered in Victoria. The ships in question were registered in Victoria, and were engaged in trade between Calcutta and the neighbouring ports of Australia, sometimes going to South Africa. They carried cargo and passengers to and from Asia, Australia and South Africa. The ships' articles were always signed in Calcutta, not in Australia. The officers were all domiciled in Australia and were always engaged in Australia, and although not entitled to be discharged at Australian ports, they were usually allowed to leave such ports if they wish, with the consent of the master. The ships often make short trips from Calcutta to other Indian ports, but do no inter-state trade in Australia. The claimants claimed that under these circumstances the Commonwealth Court had jurisdiction to make an award which will govern the wages, hours and conditions of labour of the officers on those ships engaged in that trade. The High Court held that the Court had no jurisdiction to settle the dispute. Ships engaged in such a trade are not ships "whose first port of clearance and whose port of destination are in the Commonwealth" within the meaning of clause V. of the Commonwealth of Australia Constitution Act.

The Chief Justice (Sir SAMUEL GRIFFITH) said :—"The terms 'first port of clearance' and 'port of destination' are terms well known in shipping law. Every ship, before starting on a voyage,



must obtain a clearance. The first port of clearance is the port where she gets her clearance on beginning a voyage. The port of destination obviously means the end of that voyage. So that the Act applies only to cases where the beginning and the end of a voyage are both in the Commonwealth. Under these circumstances, it seems to me impossible to say that these ships, while engaged in the trade I have described, are ships 'whose first port of clearance and whose port of destination are in the Commonwealth.' The most favourable view that can be taken in favour of the claimants is to assume that their port of departure or first port of clearance is an Australian port, which is extremely doubtful. Regarding the case from that point of view, it is impossible to say that the port of destination is also in the Commonwealth. The question, therefore, must, in my opinion, be answered in the negative": 5 C.L.R., at p. 743.

Mr. Justice O'CONNOR said:—"The 'first port of clearance' and 'port of destination' are clearly intended to describe the beginning and the end of one continuous voyage. There is no difficulty about the expression 'first port of clearance.' The Merchant Shipping Acts, all Customs Acts, and many Port Acts, require compliance with various requirements before a ship is permitted to go to sea. The certificate of the officer authorized by law to determine that the requirements have been complied with, is known as the 'clearance certificate' or the 'clearance.' The first port of clearance would, therefore, ordinarily be the port from which the voyage begins. The expression 'port of destination,' which describes the other terminal point is not so free from ambiguity. It might be said, although Mr. Knox did not raise the contention, that the voyage intended to be described was merely from port to port within the Commonwealth. But that interpretation is not consistent with the whole provision. There can be only one 'first port of clearance' on each voyage, and, in the case of a ship making an inter-state voyage round Australia, if the words 'port of destination' were read as meaning the first port of call the section would apply only between the commencement of the voyage and that port, for the rest of the voyage it would have no operation. The only interpretation which will give any effective operation to the section is to take the port of destination as meaning port of 'final destination' or last port of the voyage. The words of section V. would then be taken to describe a round voyage beginning and ending

within the Commonwealth. That is the class of voyage to which, in my opinion, the section was intended to apply." : 5 C.L.R., at p. 745.

In the case of *The Merchants Service Guild of Australasia v. Commonwealth Steamship Owners Association*, (1913) 16 C.L.R., 664, consideration was given to the meaning of the expression "first port of clearance" and "port of destination." It was held by ISAACS and HIGGINS, JJ. and to some extent by GAVAN DUFFY and RICH JJ. that "port of clearance" indicated the beginning of the actual voyage and "port of destination" the end of the actual voyage; such voyage being one which is particularly intended at the beginning of the voyage and that the ships papers are not conclusive of what the voyage is. BARTON, A.C.J. ruled that "port of destination" is the port from which the ship is bound as stated in her entry outwards shipping bill and manifest.

The claimants were masters and officers of ships belonging to the respondent one of which *Fiona* traded between Sydney and Fiji, from Fiji to Auckland, Auckland to Fiji and Fiji back to Sydney; another ship the *Wonganella* sailed from some port in Australia to Ocean Island or some other island of the Pacific and from Ocean Island back to Sydney for orders. The dispute arose between the claimants' organization of shipowners as to the rates of pay and conditions of employment on these outward and homeward voyages.

The President stated a case for the opinion of the High Court

- (1) Is there a dispute extending beyond the limits of any one State?
- (2) If yes, can the Court impose duties to be observed on board the said ships outside Australia and are such duties enforceable by penalty whether by virtue of clause V. of the Constitution or otherwise?

For the claimant it was argued that clause V. enabled the Court to make an award applicable to British ships coming within the meaning of that clause even when they were on high seas outside the territorial waters; that it was intended to cover more than the coasting trade and included round voyages beginning and ending in Australia. For the respondent it was argued that the expressions "first port of clearance" and "port of destination" were intended to mean a direct trip from one Australian port to another.

Mr. Justice BARTON, A.C.J. said that section 51 (xxxv.) of the Constitution gave power to the Federal Parliament to make rules of conduct to be observed within the territorial jurisdiction of the Commonwealth. As industrial disputes were disputes as to conditions of industrial employment; that employment must be within the territorial jurisdiction of the Commonwealth. A breach of any conditions of the award occurring outside the jurisdiction was not justiciable by Commonwealth law and no law commanding such conditions would be effective. "As regards clause V.," continued His Honor, "it is clear that this provision is not an additional power of legislation; it does not authorize the Parliament to make any law which it could not make under the powers granted in the Constitution. It merely extends the operation of those laws when validly made, or of such of them as can be applied. If they satisfy the conditions of validity and applicability they are in force, not only within the territorial limits of the Commonwealth, but on British ships whose first port of clearance and port of destination are in the Commonwealth. The words clearly apply to what are known as coasting voyages": 16 C.L.R., at p. 679.

Mr. Justice ISAACS considered that the case depends on the whole claim being one inseparable claim, to be settled as a whole, however the Arbitration Court might award with respect to the various parts of it. And, if so regarded the question was this: Is a combined claim for improved industrial conditions applying not merely to Australian limits of jurisdiction but to them and extra-territorial areas, a claim which comes within an "industrial dispute extending beyond the limits of any one State," as understood in the Constitution and the Act? The case, he said, has been argued, following the questions, as raising the distinct issues as to how the matter stands (1) on sub-section xxxv. of section 51 of the Constitution, apart from covering clause V.; and (2) on covering clause V. When the Commonwealth Conciliation and Arbitration Act itself is looked at, there are several indications that, unless aided by some general statutory provision such as covering clause V.; it would be understood to be confined. In His Honor's opinion whatever power the Commonwealth possesses to declare by award of the Arbitration Court rights as between ship owners and their employees on the high seas must rest upon covering clause V. and its effect upon sub-section xxxv. of section 51: 16 C.L.R., at p. 692. "The voyages intended by covering clause V." he said, "were not limited

as coasting voyages. We can only judge of the meaning of an Act by its language as applied to the subject matter. One standard is set, and only one—'the first port of clearance' at one end, the 'port of destination' at the other; these words are used in relation to an Australian Constitution, and necessarily apply to something extending beyond the territorial limits; otherwise they are useless. If beyond those limits, how far? I am quite of the opinion expressed by O'CONNOR, J. in *Merchant Service Guild of Australasia v. Archibald Currie & Co. Proprietary Ltd.* and that the 'round voyages' referred to, which were a distinct feature of Australian trade in and before 1900, were among the subject matters contemplated by covering section V; otherwise there would be utter confusion of laws. Covering clause V. does not add to the subject matters upon which Parliament may legislate, but it does enlarge the area over which the legislative authority of the Parliament extends in respect of subject matters admittedly within its competency. I therefore answer the first question by saying that by virtue of covering section V. the dispute is not the less a dispute extending beyond the limits of any one State merely because some of the operations in respect of which the dispute exists are performed extra-territorially": *Per ISAACS, J.*, 16 C.L.R., 699.

Mr. Justice HIGGINS concurred with Mr. Justice ISAACS in his judgment as to effect of clause V. Both learned Justices held that the Arbitration Court had power to require that any of the terms and conditions which it decides should be in operation between the parties shall be incorporated in a written agreement. That was in their opinion a legitimate industrial condition, tending to make certain and effective the mutual rights and relations of the parties, but the Court could not make a breach of the award for the claimant on the Pacific Ocean a punishable offence.

Mr. Justice GAVAN DUFFY and Mr. Justice RICH said: "We are disposed to think that the power to prevent and settle disputes with respect to labour to be performed outside the territorial limits, necessarily implies a power to prescribe terms and conditions with respect to such labour, for without such power it would ordinarily be impossible to either prevent or settle such disputes. But it is unnecessary to pronounce any final opinion on this question, because it seems clear to us that if it is conceded that the Court of Conciliation and Arbitration has cognizance of a dispute, then covering clause V. of the Constitution Act enables the Court to settle that

dispute by imposing obligations with respect to duties to be performed on British ships engaged in voyages coming within the terms of that section. A dispute is not necessarily less a dispute extending beyond the limits of any one State merely because some of the operations in respect of which the dispute exists are performed extra-territorially, inasmuch as some such operations must be within the ambit of covering clause V. whatever the meaning of that clause may be."

The Seamen's Compensation Act 1911 was held by the High Court to be a valid exercise of the legislative powers of the Commonwealth Parliament within sections 51 (1.) and 98 relating to interstate commerce and shipping and navigation: *The Australian Steamships Ltd. v. Malcolm*, (1915) 19 C.L.R., 298. In that case William Malcolm second mate of the steamer *Burwah* owned by the Australian Steamships Co. was drowned at sea on 7th May 1913 as the result of an accident arising out of his employment. His widow brought an action against the Company to recover compensation and she obtained judgment in the District Court Sydney for the sum of £500. The shipowners appealed to the High Court. The Seamen's Compensation Act 1911 was pronounced to be valid and it followed that under covering clause V. of the Constitution, that law was in force on board the British ship *Burwah* sailing on the High Seas, at the time when the accident occurred. Explaining this principle the Chief Justice Sir SAMUEL GRIFFITH said:—"The first observation which I have to make is that the ambit of the legislative authority of the Parliament in exercising this power as well as all others is restricted to the territorial limits of the Commonwealth. Any extra-territorial effect is to be sought in section V. of the Constitution Act under which laws made by the Parliament of the Commonwealth (i.e., of course valid laws), are to be in force on certain British ships. The test to be applied in determining the validity of the Act is, therefore, whether regarded as an act relating to intra-territorial matters, it is within the ambit of power. The circumstance that many of the operations of interstate and foreign commerce are carried on beyond the territorial jurisdiction of the Commonwealth is irrelevant": 19 C.L.R., at p. 304.

#### Definitions.

6. "The Commonwealth" <sup>17</sup> shall mean the Commonwealth of Australia as established under this Act.

“ The States ” shall mean such of the colonies of New South Wales, New Zealand, Queensland, Tasmania, Victoria, Western Australia, and South Australia, including the northern territory <sup>18</sup> of South Australia, as for the time being are parts of the Commonwealth, and such colonies or territories as may be admitted into or established by the Commonwealth as States ; and each of such parts of the Commonwealth shall be called “ a State.”

“ Original States ” shall mean such States as are parts of the Commonwealth at its establishment.

#### § 17. “ THE COMMONWEALTH.”

##### **Primary Meaning of “ Commonwealth.”**

The primary meaning and most comprehensive signification of the term “ Commonwealth ” is to be found in the preamble and first six covering clauses of the Act, in which it is distinctly used to indicate the Federal union of the Australian people and the Australian Colonies into one indissoluble political partnership under the Crown. The statutory definition is given in clause 6, which declares that “ the Commonwealth shall mean the Commonwealth of Australia as established under this Act.” By the same clause, the former Colonies of New South Wales, Queensland, Tasmania, Victoria, Western Australia and South Australia are declared to be “ parts of the Commonwealth ” under the name of “ States.”

The Commonwealth, formed by the union of the Australian people and Colonies, was established by clause 3 of the Imperial Act. It came into existence independently of the Constitution detailed in clause 9. In other words, the newly organized political society is clearly distinguishable from the new system of government. The Commonwealth, as a political entity and political partnership, is outside of and supreme over the Constitution. It is outside of and supreme over the government provided by the Constitution.

##### **Secondary Meaning of “ Commonwealth.”**

So much for the wider and more natural signification of the term “ Commonwealth,” as it is manifestly defined by the first six

covering clauses of the Imperial Act. In several sections of the Constitution, however, the term "Commonwealth" is inartistically used to denote the Central or Federal Government, as contrasted with the Governments of the States, *i.e.*, "The legislative power of the Commonwealth," section 1; "the executive power of the Commonwealth," section 61; "the judicial power of the Commonwealth," section 71. These expressions refer to the legislative, executive and judicial powers granted by the Constitution to the various organs of the central or Federal Government. In the American Constitution the term "United States" is sometimes used to describe the Union, and sometimes to denote the central or Federal Government of the Union. These are instances of the secondary use and significance of corresponding terms in both Constitutions. The secondary use and meaning of "Commonwealth" must be distinguished from its primary and proper meaning, as defined in the constructive clauses of the Imperial Act: *Pomeroy's Constitutional Law*, p. 68; *Quick and Garran's Annotated Constitution*, p. 368.

The attributes and characteristics of the union, which may be gathered from the preamble and covering clauses, can be thus summarized:—It is a *quasi* national State, composed of a related people, of ethnic unity, occupying a fixed territory of geographical unity bound together by a common Constitution, and organized by that Constitution under a dual system of provincial and central government, consisting of two sets of legislative, executive, and judicial departments, each set being operative within its own assigned sphere, and each set being subject to the common Constitution *Quick and Garran's Annotated Constitution*, p. 368.

### **The Essence of Federation.**

The essence of a federation is, that it is a community welded together and subject to a dual system of government. Not only are the people of the pre-existing communities, provinces, or colonies united, but those communities, provinces or colonies, considered as corporate political units, are also united into one larger aggregate or whole, under one common Constitution, to which they owe allegiance, and which regulates their rights and duties. Of the dual system of government referred to, one part consists of the former separate colonial or provincial governments, to the extent to which they have not been altered by the new constitutional instrument.

whilst the other part consists of the new group of governmental agencies created by the same document. Thus the legislative executive, and judicial authorities of the former provinces or colonies continue in the exercise of the residue of powers and functions left to them undisturbed by the new regime, and a fresh set of governing instrumentalities, in the shape of a federal legislature, a federal executive, and federal judiciary appear on the scene, charged with the exercise of powers and functions of a general or national character, having jurisdiction for limited and assigned purposes over the whole of the people in the united community : *Quick and Groom, The Judicial Power of the Commonwealth*, p. 2.

### The Scheme of Federal Union.

“The scheme of the Australian Constitution” said the Chief Justice in a memorable judgment, “like that of the Constitution of the United States, is to confer certain definite and specified powers upon the Commonwealth, and to leave the residue of power in the hands of the States. This is expressed in our Constitution by the language of sections 51 and 52, which confer the Federal power, and section 107, which provides that ‘Every power of a Parliament of a Colony which has become or becomes a State, shall, unless it is by this Constitution exclusively vested in the Parliament of the Commonwealth, or withdrawn from the Parliament of the State, continue as at the establishment of the Commonwealth.’ In the American Constitution it is expressed in the words of the tenth amendment :—‘The powers not delegated to the United States by the Constitution, nor prohibited to it by the States, are reserved to the States respectively, or to the people.’ In our judgment the schemes of these two Constitutions are, in this respect, identical. In neither case is any new power conferred upon the States, nor is there any exclusive distribution of powers, except as to a limited class of cases. It was suggested in argument that a distinction is to be found in the fact that in the United States the ultimate source of power is the people, i.e., the collective people of the United States in the one case, and the people in the several States in the other, while in Australia the ultimate source is, in each case, the Crown or the Parliament of the United Kingdom. We are quite unable to see the relevancy of this distinction. It is a matter of common knowledge that the framers of the Australian Constitution were familiar with the two great examples of English speaking federations, and deliberately adopted, with regard



to the distribution of powers, the model of the United States, in preference to that of the Canadian Dominion. They used language not verbally identical, but synonymous, for the purpose of defining that distribution. And the respective powers of the Commonwealth and the States having been defined and distributed by the ultimate sovereign power, it appears to be quite irrelevant to the question of interpretation whether that sovereign power is one or several, or whether it is the collective people or a personal monarch or a constitutional parliament. The scheme of the Canadian Constitution, which was rejected by the framers of this Constitution, is essentially different. An attempt was made in the British North America Act, by which the powers of the Dominion and the Provinces are conferred, to enumerate all possible subjects of legislation and to distribute them between the Dominion and the Provinces, giving the power in each case to the one authority to the exclusion of the other. It follows that every power of legislation must reside in one authority or the other, and if it cannot be exercised by the authority on whom it is conferred in express terms, it cannot be exercised at all": *Per* the Chief Justice (Sir SAMUEL GRIFFITH), in *Deakin v. Webb* and *Lyne v. Webb*, (1904) 1 C.L.R., at p. 605.

## § 18. "INCLUDING THE NORTHERN TERRITORY OF SOUTH AUSTRALIA."

### **The Northern Territory.**

The Northern Territory ceased to be a part of the State of South Australia on the 1st January 1911, having been surrendered by the State and accepted by the Commonwealth by virtue of an agreement dated the 7th December 1907, which the Parliament of South Australia ratified by the Northern Territory Surrender Act 1907, and the Federal Parliament ratified by the Northern Territory Acceptance Act 1910.

Repeal of Federal Council Act—48 & 49 Vict. c. 60.

7. The Federal Council of Australasia Act, 1885, is hereby repealed, but so as not to affect any laws passed by the Federal Council of Australasia and in force at the establishment of the Commonwealth.

Any such law may be repealed as to any State by the Parliament of the Commonwealth, or as to any

State by the Parliament of the Commonwealth, or as to any colony not being a State by the Parliament thereof.

The Service and Execution of Process Act 1901, No. 11 of 1901, section 2, repeals the following Acts passed by the Federal Council of Australasia :—The Australasian Civil Process Act 1886 ; The Australasian Judgments Act 1886 ; The Australasian Testamentary Process Act 1897.

The Defence Act 1903, No. 20 of 1903, section 6, declares that the Federal Garrison Act 1893, passed by the Federal Council of Australasia, shall cease to apply to the naval and military forces of the Commonwealth, or to any member thereof.

Application of Colonial Boundaries Act—58 & 59 Vict. c. 34.

8. After the passing of this Act the Colonial Boundaries Act, 1895, shall not apply to any colony which becomes a State of the Commonwealth ; but the Commonwealth shall be taken to be a self-governing colony for the purposes of that Act.

#### Constitution.

9. The Constitution of the Commonwealth shall be as follows :—

### THE CONSTITUTION.

The Constitution is divided as follows :—

#### Chapter I.—The Parliament :

##### Part I.—General :

##### Part II.—The Senate :

##### Part III.—The House of Representatives :

##### Part IV.—Both Houses of the Parliament :

##### Part V.—Powers of the Parliament :

#### Chapter II.—The Executive Government :

#### Chapter III.—The Judicature :

- Chapter IV.—Finance and Trade:  
 Chapter V.—The States:  
 Chapter VI.—New States:  
 Chapter VII.—Miscellaneous:  
 Chapter VIII.—Alteration of the Constitution.  
 The Schedule.

## CHAPTER I.—THE PARLIAMENT.

### PART I.—GENERAL.

#### Legislative power.

1. The legislative <sup>10</sup> power of the Commonwealth shall be vested in a Federal Parliament, which shall consist of the Queen, a Senate, and a House of Representatives, and which is hereinafter called “The Parliament,” or “The Parliament of the Commonwealth.”

#### § 19. “LEGISLATIVE POWER.”

##### Plenary not Delegated Powers.

When plenary powers of legislation exist as to particular subjects, whether in an Imperial or in a Provincial Legislature, they may be well exercised, either absolutely or conditionally; and in the latter case leaving to the discretion of some external authority the time and manner of carrying its legislation into effect as also the area over which it is to extend: *Reg. v. Burah*, (1878) 3 App. Cas., 889, P.C. The Indian Legislature having authority to pass certain laws had provided that special laws, which had the effect of excluding the jurisdiction of the High Court of India, should apply to certain districts specified, and “to certain other districts” if and when the Lieutenant Governor by notification in the *Calcutta Gazette* should declare that it should so apply. The question was whether it was within the legislative power of the Indian Council to pass such a law. The Privy Council (*Per* Lord SELBORNE) said: —“Legislation, conditional on the use of particular powers, or on the exercise of a limited discretion, entrusted by the Legislature to persons in whom it places confidence, is no uncommon thing; and, in many circumstances it may be highly convenient. The British Statute Book abounds with examples of it; and it cannot

be supposed that the Imperial Parliament did not, when constituting the Indian Legislature, contemplate this kind of conditional legislation as within the scope of the legislative powers which it from time to time conferred": (1878) 3 App. Cas., 889.

The Provincial Legislature of Ontario (Canada), in dealing with the liquor traffic, created a new body called the Board of Licence Commissioners, and empowered them to pass resolutions defining the conditions of tavern licences, and to impose penalties for the infraction of such conditions. The Commissioners passed a by-law providing *inter alia* that licensed persons should not allow any billiard table to be used during the time prohibited by the Act or the by-law for the sale of liquor. They affixed a money penalty, in default distress, and in default of sufficient distress imprisonment with or without hard labour. Hodge was convicted for breach of the provision, and was fined, and was ultimately sent to gaol to be kept there for 15 days unless the fine was sooner paid. He appealed to the Privy Council. It was argued, first, that the Ontario Legislature itself had no power to legislate as the Commissioners had resolved, but it was held that the Legislature had such power if it had itself exercised it. Then it was contended that the principle of *delegatus non delegare potest* applied, and the power could not be delegated. Their Lordships, following *Reg. v. Burah*, rejected the suggestion that a Colonial Legislature is a delegate of the Imperial Parliament, and held that within the limits assigned by the Canadian Constitution it had powers of legislation as plenary and ample "as the Imperial Parliament in the plenitude of its power possessed or could bestow." Their Lordships said: "Within these limits of subjects and area the local Legislature is supreme, and has the same authority as the Imperial Parliament, or the Parliament of the Dominion of Canada would have had under like circumstances to confide to a municipal institution or body of its own creation, authority to make by-laws or resolutions as to subjects specified in the enactment, and with the object of carrying the enactment into operation": *Hodge v. The Queen*, (1884) 9 App. Cas., at p. 132.

A Colonial Legislature is not a delegate of the Imperial Parliament. It is restricted in the area of its powers, but within that area it is plenary. Therefore the Customs Regulation Act of 1879, section 133, of New South Wales, is within the plenary powers of legislation conferred upon the Legislature of that Colony by the Constitution Act (schedule to 18 & 19 Vict. c. 54). Further,

duties levied by an Order in Council issued under section 133, were held to be really levied by authority of the Legislature and not of the Executive. Under section 133 "the opinion of the collector." whether right or wrong, authorizes the action of the Governor : *Powell v. Apollo Candle Co.*, 54 L.J., P.C., 7 ; (1885) 10 App. Cas., 282.

The Commonwealth Customs Act 1901, section 52, sub-section (g), provides that all goods the importation of which shall be prohibited by proclamation issued by the Governor-General in Council, shall be prohibited imports.

A proclamation was issued prohibiting the importation of opium into the Commonwealth. Ah Way was convicted of the offence and appealed to the High Court. On his behalf it was argued that section 52, sub-section (g) was *ultra vires* of the Parliament. It was a delegation of legislative power by Parliament to the Governor-General. Such a delegation was repugnant to the Constitution, section 1, which provides that the legislative power of the Commonwealth shall be vested in a Federal Parliament, consisting of the Sovereign and two Houses. It was stated by the American Courts, in dealing with the corresponding provision of the American Constitution, that it was an axiom in constitutional law, universally recognized as a principle essential to the integrity and maintenance of this system of government under the Constitution, that no part of the legislative power could be delegated by the Parliament to any other tribunal or body : *Field v. Clark*, 143 U.S., 649, at p. 697.

On behalf of the Commonwealth it was contended that the proclamation was valid. It was not legislation by the Governor-General. If it was an exercise of legislative power it was an exercise of that power by Parliament itself. If not a direct exercise of legislative power by Parliament it was at any rate an indirect exercise of that power ; the act of legislation was the passing of the Customs Act, and the proclamation was the exercise of a power by the subordinate authority appointed by Parliament for carrying the Act into effect. Parliament had power to confer such authority upon any person or body fitted to exercise it. It could not confer a power to legislate independently, but the power conferred might be quasi-legislative in that its exercise was necessary in order to give effect to the legislative Act of the Parliament in a particular

direction. Sub-section (g) of section 52 merely conferred upon the Governor-General a discretion to determine to what goods other than those already mentioned, and under what conditions, the prohibition of importation should apply. It went no further than the legislation discussed in *Reg. v. Burah*, 3 App. Cas., 889. *Hodge v. The Queen*, 9 App. Cas., 117. *Powell v. Apollo Candle Co. Ltd.*, 10 App. Cas., 282, which was held *intra vires*.

It was held by the High Court that section 52, sub-section (g) of the Customs Act was not a delegation of legislative power, but conditional legislation, and therefore within the power conferred on Parliament by the Constitution, section 51, sub-sections I., II. The prohibition of importation was a legislative act of the Parliament itself, the effect of sub-section (g) being to confer upon the Governor-General in Council the discretion to determine, subject to section 56 of the Act, to which class of goods other than those specified in the section, and under what conditions, the prohibition shall apply. It was held, therefore, that a proclamation by the Governor-General in Council, prohibiting the importation into the Commonwealth of opium suitable for smoking, was valid: *Baxter v. Ah Way*, (1909) 8 C.L.R., 626.

The Chief Justice (Sir SAMUEL GRIFFITH) after reviewing the Privy Council's decision said:—"The same observations apply exactly to a law of the Commonwealth or of a State under its Constitution. It is suggested that the words of the first section of the Constitution, which provides that the legislative power of the Commonwealth shall be vested in a Federal Parliament, make a difference. But that section is merely introductory to the provisions of the Constitution which deal with the Legislature. Then come other provisions dealing with the executive power, followed by another series dealing with the judicial power. The actual powers of the Parliament are conferred by section 51, and in their ambit they are unlimited. There being no objection to a conditional law being passed, this is a case of that sort": 8 C.L.R., at p. 634.

Mr. Justice O'CONNOR said:—"I think, therefore, that there can be no question whatever that the full powers of legislation which are conferred upon the Commonwealth Parliament to deal with Customs and to deal with trade and commerce between the Commonwealth and other countries embody a power to enact the conditional legislation now in question, which enables the Executive

Government, in keeping a watchful eye upon the interests of the Commonwealth and its commerce, to act in the public interest on some sudden emergency which it would have been impossible for any Legislature, no matter how great the extent of its prescience, to foresee. Under these circumstances, without referring to the authorities which undoubtedly bear out and support, as my learned brother the Chief Justice has pointed out, the common use of this power of conditional legislation and the sound principle upon which it rests, I content myself with saying that by the Constitution, if its words are to be read in the sense in which they have always been understood, the power to authorize such a proclamation by the Governor-General in Council is clearly conferred in the Commonwealth."

Mr. Justice HIGGINS said :—" According to my view, there is not here in fact any delegation of the law-making power ; and, besides, as I understand the cases of *Reg. v. Burah*, and the other cases following it before the Privy Council, that principle is not applicable to the case of the numerous subordinate Parliaments created by the British Parliament, whether they have power in themselves to alter their own Constitutions or not. Analogies are dangerous ; but if I may, for the present purpose, venture on one, I should say that within the ambit of the subjects committed to it, the Federal Parliament, and that within the ambit of the subjects committed to them, the State Parliaments, are like general agents, not like special agents ; and that the Federal Parliament has, within its ambit, full power to frame its laws in any fashion, using any agent, any agency, any machinery that in its wisdom it thinks fit, for the peace, order, and good government of Australia " : *Baxter v. Ah Way*, (1909) 8 C.L.R., 646.

### War Powers by Regulation.

The War Precautions Act 1914-15, provides that the Governor General may make regulations for securing the public safety and the defence of the Commonwealth, . . . and for conferring such powers and imposing such duties as he thinks fit, with reference thereto, upon the Naval Board and the Military Board, and the members of the Naval and military forces of the Commonwealth, and other persons. Under these statutory powers, a regulation was passed as follows :—" Where the Minister has reason to believe that any naturalized person is disaffected or disloyal, he may, by

warrant under his hand, order him to be detained in military custody in such place as he thinks fit during the continuance of the present state of war."

The War Precautions Act 1914-15 was passed under the power conferred by the Constitution, section 51 (vi.) to make laws with respect to naval and military defence. The primary purpose of the Act was to make regulations for the safety of the Commonwealth during a state of war. The Act evidently authorized the delegation of legislative power under peculiar circumstances and for special purposes. Its object was to provide means of legislating freely and quickly on all sorts of matters as might arise during a critical juncture in the history of the Commonwealth whether Parliament was sitting or not.

A naturalized citizen of the Commonwealth named Francis Wallach, having been taken into custody and interned by virtue of a warrant issued by the Minister of Defence certifying that such person was believed by the Minister to be disaffected or disloyal, Wallach applied to the Supreme Court of Victoria for a writ of *habeas corpus*. On the return of the writ the Supreme Court, by a majority, ordered Wallach to be discharged on the grounds that the regulation was invalid ( (1915) V.L.R., 476). From that decision the Commonwealth, by special leave, appealed to the High Court. It was held by the whole Court, that assuming that the fact of the Minister's belief and the grounds for his belief were examinable, and that the Minister was properly called as a witness, the Minister was entitled to refuse to answer questions as to his belief; that there was no evidence to challenge either the fact of his belief or the grounds for it; and therefore that Wallach's detention under the warrant was justified.

The Chief Justice, (Sir SAMUEL GRIFFITH) said :—" The term ' regulations ' has of recent years been much used to denote ordinances having the force of law made by subordinate authorities under delegated powers, and in my opinion it is used in that sense in the War Precautions Act. The power now in question is therefore a delegated power to make laws for (1) securing the public safety and the defence of the Commonwealth, and (2) conferring such powers and imposing such duties as the Governor-General thinks fit thereto upon the persons designated. A question was raised whether the words ' with reference thereto ' mean ' with



reference to securing the public safety and the defence of the Commonwealth' or 'with reference to the regulations.' The second construction involves, perhaps, an awkward repetition in the phrase 'regulations for conferring powers and imposing duties with reference to the regulations,' but the general sense is, I think, sufficiently plain, whichever of the two suggested meanings is adopted. The power conferred is to make laws to be observed by subjects, and also to prescribe the mode of enforcing the laws so made and designate the persons on whom the duty of enforcement is to be imposed. I think therefore," said the Chief Justice, "that the regulation is a power conferred by an Act and is valid."

Mr. Justice HIGGINS said, "There is no question as to the power of the Parliament to delegate legislative powers—power to legislate by regulations—to subordinate persons or bodies": *Lloyd v. Wallach*, (1915) 20 C.L.R., 299.

Governor-General.

2. A Governor-General appointed by the Queen shall be Her Majesty's representative<sup>20</sup> in the Commonwealth, and shall have and may exercise in the Commonwealth during the Queen's pleasure, but subject to this Constitution, such powers and functions<sup>21</sup> of the Queen as Her Majesty may be pleased to assign to him.

## § 20. "HER MAJESTY'S REPRESENTATIVE."

### The King's Representative.

The King's representative in the Commonwealth and in each of the States cannot, as was pointed out in *Musgrave v. Pulido*, 5 App. Cas., 102, at p. 111, be regarded as Viceroy, or as possessing sovereign power. His powers are limited by his instructions and are also necessarily limited by the Constitution of the State or the Commonwealth as the case may be. In anything outside the exercise of the powers so limited he is in law no more than an individual subject of the King. A Federal Constitution in its very nature pre-supposes the separate and independent existence of the King as representing the community in each State and in the Commonwealth respectively, the King in that representative capacity as head of the executive being in a position in each case to assert and

maintain the rights of the political entity he represents: *Per* O'CONNOR, J. in *The King v. Sutton*, 5 C.L.R., at p. 805.

## § 21. "POWERS AND FUNCTIONS."

### Royal Instructions.

The following is a copy of the instructions to the Governor-General and Commander-in-Chief of the Australian Commonwealth passed under the Royal Sign Manual and Signet of Queen Victoria :—

*Dated 29th October, 1900.*

VICTORIA R. I.

INSTRUCTIONS to Our Governor-General and Commander-in-Chief in and over our Commonwealth of Australia, or in his absence, to our Lieutenant-Governor or the Officer for the time being administering the Government of our said Commonwealth.

Given at Our Court at Saint James's, this Twenty-ninth day of October, 1900, in the Sixty-fourth year of Our Reign.

WHEREAS by certain Letters Patent bearing even date herewith, We have constituted, ordered, and declared that there shall be a Governor-General and Commander-in-Chief (therein and hereinafter called the Governor-General), in and over Our Commonwealth of Australia (therein and hereinafter called Our said Commonwealth). And We have thereby authorized and commanded Our said Governor-General to do and execute in due manner all things that shall belong to his said command, and to the trust We have reposed in him, according to the several powers and authorities granted or appointed him by virtue of the said Letters Patent and of such Commission as may be issued to him under Our Sign Manual and Signet, and according to such Instructions as may from time to time be given to him, under our Sign Manual and Signet, or by Our Order in Our Privy Council, or by Us through One of Our Principal Secretaries of State, and to such laws as shall hereafter be in force in Our said Commonwealth. Now, therefore, We do, by these Our Instructions under Our Sign Manual and Signet, declare our pleasure to be as follows :—

I. Our first appointed Governor-General shall, with all due solemnity, cause Our Commission, under Our Sign Manual and Signet, appointing Our said Governor-General to be read and published in the presence of Our Governors, or in their absence of our Lieutenant-Governors of Our Colonies of New South Wales, Victoria, South Australia, Queensland, Tasmania, and Western Australia, and such of the members of the Executive Council, Judges, and members of the Legislatures of Our said Colonies as are able to attend.

II. Our said Governor-General of Our said Commonwealth shall take the Oath of Allegiance in the form provided by an Act passed in the Session holden in the thirty-first and thirty-second years of Our Reign, intituled "An Act to amend the Law relating to Promissory Oaths;" and likewise the usual Oath for the due execution of the office of Our Governor-General in and over Our said Commonwealth, and for the due and impartial administration of justice; which Oaths Our said Governor and Commander-in-Chief of Our Colony of New South Wales or, in his absence, our Lieutenant-Governor or other officer administering the Government of Our said Colony, shall and he is hereby required to tender and administer unto him.

III. Every Governor-General, and every other officer appointed to administer the Government of Our said Commonwealth after Our said first appointed Governor-General, shall, with all due solemnity, cause Our Commission, under Our Sign Manual and Signet, appointing Our said Governor-General, to be read and published in the presence of the Chief Justice of the High Court of Australia, or some other Judge of the said Court.

IV. Every Governor-General, and every other officer appointed to administer the Government of Our said Commonwealth after Our said first appointed Governor-General, shall take the Oath of Allegiance in the form provided by an Act passed in the Session holden in the thirty-first and thirty-second years of Our Reign, intituled "An Act to amend the Law relating to Promissory Oaths;" and likewise the usual Oath for the due execution of the Office of Our Governor-General in and over our said Commonwealth, and for the due and impartial administration of justice; which Oaths the Chief Justice of the High Court of Australia, or some other Judge of the said Court, shall and he is hereby required to tender and administer unto him or them.

V. And We do authorize and require Our said Governor-General from time to time, by himself or by any other person to be authorized by him in that behalf, to administer to all and to every persons or person, as he shall think fit, who shall hold any office or place of trust or profit in Our said Commonwealth, the said Oath of Allegiance, together with such other Oath or Oaths as may from time to time be prescribed by any laws or statutes in that behalf made and provided.

VI. And We do require our said Governor-General to communicate forthwith to the Members of the Executive Council for Our said Commonwealth these Our Instructions, and likewise all such others, from time to time, as he shall find convenient for Our service to be imparted to them.

VII. Our said Governor-General is to take care that all laws assented to by him in Our name, or reserved for the signification of Our pleasure thereon shall, when transmitted by him, be fairly abstracted in the margins, and be accompanied, in such cases as may seem to him necessary, with such explanatory observations as may be required to exhibit the reasons and occasions for proposing such laws; and he shall also transmit fair copies of the Journals and Minutes of the proceedings of the Parliament of Our said Commonwealth, which he is to require from the clerks, or other proper officers in that behalf, of the said Parliament.

VIII. And we do further authorize and empower Our said Governor-General, as he shall see occasion, in Our name and on Our behalf, when any crime or offence against the laws of Our Commonwealth has been committed for which the offender may be tried within Our said Commonwealth, to grant a pardon to any accomplice in such crime or offence who shall give such information as shall lead to the conviction of the principal offender, or of any one of such offenders if more than one; and further, to grant to any offender convicted of any such crime or offence in any Court, or before any Judge, Justice, or Magistrate within our said Commonwealth, a pardon, either free or subject to lawful conditions, or any respite of the execution of the sentence of any such offender for such period as to Our said Governor-General may seem fit, and to remit any fines, penalties, or forfeitures which may become due and payable to Us. Provided always, that Our said Governor-General shall not in any case, except where the offence has been of a political nature, make it a condition of any pardon or remission of sentence that the offender shall be banished from or shall absent himself from Our said Commonwealth. And We do hereby direct and enjoin that Our said Governor-General shall not

pardon or reprieve any such offender without first receiving in capital cases the advice of the Executive Council for Our said Commonwealth, and in other cases, the advice of one, at least, of his Ministers; and in any case in which such pardon or reprieve might directly affect the interests of Our Empire, or of any country or place beyond the jurisdiction of the Government of Our said Commonwealth, Our said Governor-General shall, before deciding as to either pardon or reprieve, take those interests specially into his own personal consideration in conjunction with such advice as aforesaid.

IX. And whereas great prejudice may happen to Our service and to the security of Our said Commonwealth by the absence of Our said Governor-General, he shall not, upon any pretence whatever, quit our said Commonwealth without having first obtained leave from Us for so doing under Our Sign Manual and Signet, or through one of Our Principal Secretaries of State.

V.R.I.

INSTRUCTIONS to the

Governor-General and Commander-in Chief of the  
COMMONWEALTH OF AUSTRALIA.

It will be seen that these instructions fully recognise the principle of responsible government under the Constitution of the Commonwealth. The Governor-General is directed and enjoined to exercise the prerogative of pardon pursuant to the advice of the Executive Council of the Commonwealth. These instructions stand out in remarkable contrast to those imparted to Sir CHARLES DARLING, Governor of Victoria, signed "V. Rg." bearing date 23rd June 1863, which contained the following paragraph—

XIII. Now, We do hereby direct and enjoin you to call upon the Judge presiding at the trial of any offender who may from time to time be condemned to suffer death by the sentence of any court within Our said Colony, to make to you a written report of the case of such offender and such report of the said judge shall by you be taken into consideration at the first meeting thereafter which may be conveniently held, of Our said Executive Council, where the said judge shall be specially summoned to attend, and you shall not pardon or reprieve any such offender as aforesaid unless it shall appear to you expedient so to do, upon receiving the advice of our Executive Council therein, but in all such cases you are to decide either to extend or to withhold a pardon or reprieve according to your own deliberate judgment, whether the members of Our said Executive Council concur therein or otherwise; entering nevertheless on the minutes of the said Council a minute of your reasons at length, in case you should decide any such question in opposition to the judgment of the majority of the members thereof

The circumstances under which those instructions were afterwards altered as the result of persistent protests by the Hon. GEORGE HIGINBOTHAM, in his capacity as a private citizen, as well as a statesman and a judge of the Supreme Court of Victoria, constitute a very interesting episode in constitutional history. It is but just to Sir HENRY HOLLAND (afterwards Lord KNUTSFORD) to say that when he was Secretary of State for the Colonies in July 1898, he

having considered Mr. HIGINBOTHAM's representations and protests communicated to him through Governor Sir HENRY LOCH, re-drafted the Colonial Governor's instructions, substantially in their present form, omitting those inconsistent with the principle of responsible government so strenuously objected to by Mr. HIGINBOTHAM. The amended instructions were published in the *Victorian Government Gazette* on 2nd September 1892.

Lord KNOTSFORD went out of office toward the end of 1892 and one of his last official acts was the issue of the new instruction which were signed "V.R.I." on the 9th July of the same year. "The Victorian newspapers" (wrote Professor EDWARD E. MORRIS, in his *Memoir of George Higinbotham*) "commented on the change and praised the wisdom of the Colonial Office in making it, but no one remembered the Victorian politician whose persistent efforts were at last successful. The number of the *Gazette* was published only four months before GEORGE HIGINBOTHAM's death": p. 229.

#### Salary of Governor-General.

3. There shall be payable to the Queen out of the Consolidated Revenue fund of the Commonwealth, for the salary<sup>22</sup> of the Governor-General, an annual sum which, until the Parliament otherwise provides, shall be ten thousand pounds.

The salary of a Governor-General shall not be altered during his continuance in office.

### § 22. "SALARY OF THE GOVERNOR-GENERAL."

#### LEGISLATION.

In addition to the official salary of the Governor-General. Parliament makes annual provision for the payment of certain charges and expenses in connection with the office and in connection with the upkeep of Government Houses in Sydney and Melbourne. In 1917-18 these expenses were as follows:—Official secretary's office salaries £1,980; contingencies, including cost of cables to British Government £8,424; repairs, fittings, furniture, lighting £6,351: supervision of work £120—Total £16,875.

#### Provisions relating to Governor-General.

4. The provisions of this Constitution relating to the Governor-General extend and apply to the Governor-

General for the time being, or such person as the Queen may appoint to administer the Government of the Commonwealth; but no such person shall be entitled to receive any salary from the Commonwealth in respect of any other office during his administration of the Government of the Commonwealth.

Sessions of Parliament.—Prorogation and Dissolution.

5. The Governor-General may appoint such times for holding the sessions of the Parliament as he thinks fit, and may also from time to time, by Proclamation or otherwise, prorogue the Parliament, and may in like manner dissolve<sup>23</sup> the House of Representatives.

Summoning Parliament.

After any general election the Parliament shall be summoned to meet not later than thirty days after the day appointed for the return of the writs.

First session.

The Parliament shall be summoned to meet not later than six months after the establishment of the Commonwealth.

### § 23. "MAY DISSOLVE THE HOUSE OF REPRESENTATIVES."

#### The Dissolution Power.

In the United Kingdom the power of the Sovereign to dissolve Parliament is called a prerogative of the Crown, being derived from time immemorial. In the Colonies and Dominions it is rather a statutory power than a common law prerogative. Whatever be its proper designation it is an authority of immense value and utility in bringing about harmony and co-operation between the various branches of the Legislature, or in establishing a proper workable relation between the executive and the Legislature. This power may be exercised by the Sovereign or by a Representative of the Sovereign at any time, subject only to the constitutional rule, which, under parliamentary government, necessitates that it shall be

advised by a Minister of State directly responsible to the Chamber having the initiative of supplies. It has been termed "the most popular of all the prerogatives of the Crown, which can never be exercised except for the benefit of the people, because it makes them arbiter of the dispute." It appeals to the people, in the last resort, to determine the policy which shall prevail in the government of the nation, and the Minister by whom that policy shall be carried out: *Todd's Parliamentary Government in the British Colonies*, 2nd ed., p. 759.

It is, however, a power which should be resorted to with great caution and forbearance. Frequent, unnecessary or abrupt dissolutions of Parliament inevitably tend to "blunt the edge of a great instrument, given to the Crown for its protection"; and, whenever they have occurred, they have been fraught with danger to the Commonwealth. It must be exercised by the Sovereign and by a Representative of the Sovereign, after due inquiry, in the exercise of an unfettered judgment. Upon such an occasion, the Sovereign or his Representative ought by no means to be a passive instrument in the hands of his Ministers. It is not merely his right but his duty to exercise his judgment in the advice they may tender to him; though, by refusing to act upon that advice, he incurs a serious responsibility, if they should in the end prove to be supported by public opinion. There is, perhaps, no case in which this responsibility may be more safely and more usefully incurred than when Ministers have asked to be allowed to appeal to the people from a decision pronounced against them by the House of Commons. For they might prefer this request when there was no probability of the vote of the House being reversed by the nation and when a dissolution would be injurious to the public interests. In such a case the Sovereign ought clearly to refuse to allow a dissolution: *Todd's Parliamentary Government in the British Colonies*, 2nd ed., p. 760.

The Sovereign has an undoubted constitutional right to withhold his consent to the application of a Minister that he should dissolve Parliament. If the Minister to whom a dissolution has been refused is not willing to accept the decision of the Sovereign, it is his duty to resign. He must then be replaced by another Minister, who is prepared to accept full responsibility for the act of the Sovereign and for its consequences, in the judgment of Parliament. It is evident, therefore, that when in the exercise of this

prerogative a dissolution is either granted or refused, the Sovereign must be sustained and justified by the advice of a responsible Minister. If this be constitutionally necessary in the case of the Sovereign, it is doubly so in the case of his Representative in the Colonies and Dominions. For the Sovereign is not personally responsible to any earthly authority; but a Governor is directly responsible to the Crown for every act of his administration. It rests with the Sovereign, in the United Kingdom, or, in a Colony or Dominion, with the Representative of the Sovereign—to determine the question whether, in a particular instance, a dissolution of parliament shall or shall not be allowed: *Todd, id.*, 761.

#### **Reasons for Granting a Dissolution.**

The following have been generally accepted as reasons justifying the exercise of the power of dissolution by a Colonial Governor on the advice of his Ministers.

(1) That the Ministry has been defeated in the House originating supplies on some great question of legislative importance on which an appeal to the electors is desirable.

(2) That the Ministry has been defeated in a House which was elected under the auspices of its opponents.

(3) That there is reasonable ground to believe that an adverse vote carried in the popular chamber against the Government does not represent the opinion and wishes of the country, and would be reversed by a new House.

(4) That the majority against the defeated Ministry is so small as to make it improbable that a strong Government could be formed from the opposition.

(5) That an appeal to the electors is necessary in order to restore harmony and reconciliation between the two contending Houses of Parliament.

(6) That the condition of parties in the popular chamber is such that there are no reasonable prospects of any Ministry obtaining sufficient support to enable it to conduct the public business satisfactorily.

#### **Grounds for Refusing.**

It is generally considered in Parliamentary practice that the following are reasonable grounds for a Colonial Governor refusing to act on the advice of his Ministers to grant a dissolution.



(1) That the Governor has the constitutional discretion, and that in view of the whole political situation a dissolution would not be desirable in the public interests.

(2) That an adverse vote has been passed in the popular chamber against a Ministry on a purely administrative matter and not on a matter of legislation of great importance.

(3) That the Governor deemed it his duty in existing circumstances to put himself into communication with the party by which the adverse vote has been carried and to endeavour to form a Ministry without being obliged to resort to a course which he considers would be a penal dissolution.

(4) That there is a reasonable prospect for believing that existing difficulties in Parliament might be disposed of without resorting to a dissolution.

(5) That there is no reasonable assurance that a dissolution would produce a working majority in favour of the defeated Ministry.

(6) That no supply to carry on the public service has been granted by Parliament.

(7) That a conditional promise of a dissolution has been granted the Premier upon his undertaking to form a new Ministry.

(8) That a ministry has been defeated in the House of its own choice elected under its own auspices.

#### **Colonial Precedents for Refusing.**

The following are precedents of the refusal of a dissolution of Parliament by Colonial Governors, notwithstanding the advice of their Colonial Ministers :—

By Governor HEAD to the BROWN Administration in Canada  
1858.

By Viscount CANTERBURY to the DUFFY Administration in  
Victoria in June, 1872.

By Sir GEORGE BOWEN to the STAFFORD Ministry in New  
Zealand in October 1872.

By the Marquis of NORMANBY to the GREY Ministry, New  
Zealand, in November 1877.

By Sir WILLIAM STAWELL, Lieutenant of Victoria, to the first  
BERRY Ministry in August 1875.

By Governor WELD to the CROWTHER Ministry in Tasmania, in March 1878.

By the Lieutenant-Governor of Quebec to the JOLLY Ministry, in October 1879.

By Sir JOHN MADDEN, Lieutenant Governor in Victoria to the ELMSLIE Labour Ministry in December 1913.

In May 1877 Governor Weld in a despatch wrote to the Colonial Office: "In all cases the Representative of the Crown should be more careful in granting a dissolution than the Crown might be in England."

In refusing a dissolution to the ELMSLIE Labor Ministry in December 1913, Sir JOHN MADDEN, Lieutenant-Governor of Victoria, said: "A dissolution is, as I believe, never used as a penalty, but always to obtain a decision of the people as to the policy to be pursued by Parliament."

Referring to the claim of the Labor Ministry for a dissolution on the grounds that the then Victorian Assembly was elected under the auspices of the opponents of the Ministry, Sir JOHN MADDEN said:—"The principle here adverted to is one which is important, when a member is invited to form an Administration, after having defeated a Government which held office when a general election was held, and which was supported by the electors; or which had been formed or sustained as the result of a general election. In such a case, if the member who defeats such a Government has a small or uncertain majority, he sometimes asks for a dissolution, to enable him to obtain adherents definitely pledged to him, and he frequently is given such a dissolution for the reason indicated by the Premier. In the present instance, if the Premier had asked for a dissolution as a condition of his undertaking to form a Government, and if he could have shown me that he had a reasonably well-founded belief that he could obtain a majority at an election to support his policy, I would have seriously considered that proposal."

With reference to the contention of the defeated Ministry that there were reasonable grounds to believe that the adverse vote did not represent the opinion and wishes of the country and should be reversed by a new Parliament, His Excellency said:—"I am not aware of any sufficient ground to so believe in this instance. It is true that the party which supports the Premier Mr. ELMSLIE did gain three out of five elections which have taken place at by-elections during the present Parliament, but no manifestation of import-

ance of any change of opinion, in the country nor of any marked resentment at the defeat of the Government now complained of has been made by the electors, and I think that that ground also is not well founded."

Dealing with another ground, that the condition of parties in the House afforded no reasonable prospect of any Government obtaining sufficient support, His Excellency said :—" In my opinion, it would be impossible to form a just conclusion that the condition of parties in the present House is such as is indicated on this ground. A number of members, comprising a very large majority of the House, affirm that, though some of them have differed in the past, they are now generally agreed, and that a Government can now be formed from their number, which will have their united support " : *Argus*, 20th December, 1913.

#### **Commonwealth Precedents.**

The history of the Commonwealth shows that the Representative of the King in Australia has not always been a passive instrument in the hands of Ministers defeated in Parliament advising a dissolution. There have been, altogether, three decisive ministerial defeats in the House of Representatives, followed in each instance by the defeated Prime Minister applying to the Governor-General for the dissolution of Parliament and as many refusals to grant the same. The first precedent occurred on the 17th August, 1904, on the defeat and resignation of the J. C. WATSON Labor Administration. On the 17th August, 1904 (*vide Hansard*, page 4265, vol. 21), Mr. WATSON informed the House of Representatives that he had offered certain advice to the Governor-General (Lord NORTHCOTE), upon which His Excellency did not see fit to act, and that he then tendered the resignation of himself and colleagues. It was assumed that this advice related to the dissolution, but the fact was not stated.

On the 5th July, 1905 (*vide Hansard*, page 134, vol. 25), Mr. (afterwards Sir) GEORGE REID informed the House of Representatives that Ministers had decided to tender to His Excellency (Lord NORTHCOTE) advice for the dissolution of the House, and that His Excellency did not see fit to accept that advice, whereupon Ministers tendered to him their resignations.

On 27th May 1909, the first FISHER Ministry was defeated on the address in reply and an adjournment carried against them

on the motion of Mr. ALFRED DEAKIN who had joined the opposition under Mr. (now Sir) JOSEPH COOK and formed the Fusion party. Thereupon Mr. FISHER applied to the Governor-General (Earl DUDLEY) for a dissolution. A lengthy memorandum in support of the request was prepared by Mr. W. M. HUGHES, the Attorney-General in the FISHER Government and was presented to the Governor General. On 1st June His Excellency gave a formal reply refusing to dissolve without assigning any reasons: *Argus*, 2nd June 1909.

### Double Dissolution.

The foregoing observations and precedents do not apply to a double dissolution of the Senate and House of Representatives under the Constitution, section 57; as to that a different state of law and facts arise. See Note to section 57.

#### Yearly session of Parliament.

6. There shall be a session of the Parliament once at least in every year, so that twelve months shall not intervene between the last sitting of the Parliament in one session and its first sitting in the next session.

## PART II.—THE SENATE.

### The Senate.

7. The Senate<sup>24</sup> shall be composed of senators for each State, directly chosen by the people of the State, voting, until the Parliament otherwise provides, as one electorate.

But until the Parliament of the Commonwealth otherwise provides, the Parliament of the State of Queensland, if that State be an Original State, may make laws dividing the State into divisions and determining the number of senators to be chosen for each division, and in the absence of such provision the State shall be one electorate.

Until the Parliament otherwise provides there shall be six senators for each Original State. The Parliament may make laws increasing or diminishing the

number of senators for each State, but so that equal representation of the several Original States shall be maintained and that no Original State shall have less than six senators.

The senators shall be chosen for a term of six years, and the names of the senators chosen for each State shall be certified by the Governor to the Governor-General.

#### § 24. "THE SENATE."

The Senate as framed by the Federal Convention was one of the most conspicuous and certainly the most important of all the Federal features of the Constitution, using the word Federal in the sense of linking together and uniting a number of co-equal political communities under a common system of government. The Senate was designed to be not merely a branch of a bicameral Parliament; nor merely a second chamber of revision and review representing the sober second thought of the nation, such as the House of Lords is supposed to be in the British Constitution.; it was intended to be all that, but something more than that. It was to be the chamber in which the Australian States, considered as separate entities and corporate parts of the Commonwealth were represented. They were to be so represented for the purpose of enabling them to maintain and protect their constitutional rights against attempted invasions, and to give them every facility for the advocacy of their peculiar and special interests, as well as for the ventilation of their grievances. It was not deemed sufficient that they should have a Federal High Court to appeal to for the review of Federal legislation which they might consider to be in excess of the jurisdiction of the Federal Parliament. In addition to the legal remedy it was considered advisable that original States, at least, should be endowed with a parity of representation in one Chamber of the Parliament for the purpose of enabling them to effectively resist in the legislative stage, proposals threatening to invade and violate the domain of rights reserved to the States.

The ideal Senate of the Convention has not been realized; the Senate has been one of the great disappointments of federation. In this case the framers of the Constitution did not build better than they knew. They designed and built according to their lights,

and according to precedents. They expected that the Senate would attract to its membership all the best and strongest representative men in Australia to whom the motto would be "None for Party, all for the State"; this anticipation has not been realized. In actual practice the Senate has become a Chamber composed of members representing political parties similar in composition to those of the House of Representatives. Instead of being a Council of States, it has become a party chamber. The principle of equality of State representation in the Senate was conceded for the protection of State rights and not for the representation of political parties. This unexpected development has been brought about to some extent by the evolution of new political parties and new political forces in Australia which were beyond the ken and vision of the framers of the Constitution. It was never expected that political organization and machine politics known as the Caucus system and the system of voting by party tickets would become within a few years after Federation such a perfect science, that the electors would practically be deprived of the right of choosing and nominating candidates for the Senate and that such choice and nomination would by party organization and party discipline become the monopoly of a few and that in voting for candidates for the Senate electors would be required to vote for bunches of men whose names are bracketed together in a ticket, thereby excluding the nomination of desirable candidates who would not stoop or bow down to party managers and party organizers. Whatever objections may be taken to the choice of American Senators by the various State Legislatures, anti-democratic as it is, it has not had the effect of excluding from the American Senate, the strongest, the most gifted and most eloquent statesmen in the United States.

It has been proposed that there should be a reform in the method of choosing members of the Australian Senate by abolishing the one electorate in each State provided by the Constitution, section 7, and by substituting three electorates in each State, each of the three electorates returning two Senators retiring by rotation one every three years. Such a reform would be within the competence of the Parliament of the Commonwealth to adopt, as the present method of voting in one electorate in each State is only a temporary one to remain until the Parliament otherwise provides. Such a change might possibly be an improvement on the existing system and would prevent the Senate elections from being such a

scramble as they are at present, when thousands of electors in Australia go to the poll and vote blindly not knowing anything about the Senate candidates, for whom they vote according to party ticket, whilst thousands of others vote carelessly and recklessly with absolute disregard to the names or identity of the candidates opposite whose names they place the regulation mark.

Qualification of electors.

8. The qualification of electors<sup>25</sup> of senators shall be in each State that which is prescribed by this Constitution, or by the Parliament, as the qualification for electors of members of the House of Representatives ; but in the choosing of senators each elector shall vote only once.

**§ 25. "QUALIFICATIONS OF ELECTORS OF SENATORS."**

LEGISLATION.

COMMONWEALTH FRANCHISE ACT 1902.

**Qualifications of Electors.**

Subject to certain disqualifications all persons not under 21 years of age male or female, married or single, who have lived in Australia for six months continuously, who are natural born or naturalized subjects of the King and whose names are on the electoral roll for any electoral division are entitled to vote at the election of members of the Senate and the House of Representatives. No person who is of unsound mind or attainted of treason or who has been convicted and is under sentence or subject to be sentenced for any offence punishable under the law of any part of the King's Dominions by imprisonment for one year or longer, is entitled to be so placed on the electoral roll or to vote at any election of members of the Senate or the House of Representatives. No aboriginal native of Australia, Asia, Africa or the Islands of the Pacific except New Zealand is entitled to have his name placed on an electoral roll unless so entitled under the Constitution, section 41.

Method of election of senators.

9. The Parliament of the Commonwealth may make laws prescribing the method of choosing senators, but so that the method shall be uniform for all the States.

Subject to any such law, the Parliament of each State may make laws prescribing the method<sup>28</sup> of choosing the senators for that State.

Times and places.

The Parliament of a State may make laws for determining the times and places of elections of senators for the State.

§ 28. "METHOD OF CHOOSING SENATORS."

LEGISLATION.

SENATE ELECTIONS ACT 1903.

COMMONWEALTH ELECTORAL ACT 1902-11, Section 150.

COMMONWEALTH ELECTORAL ACT 1918, Section 123.

The Senate Elections Act 1903 makes provision for the election of senators to fill periodical triennial or casual vacancies. The election of senators to fill both periodical and casual vacancies have to be conducted at one and the same election. The number of candidates required to be elected at the election must be the whole number required to fill the periodical and the casual vacancies. Those of the elected candidates to the number of the periodical vacancies who received the largest number of votes are deemed to be elected to fill the periodical vacancies whilst the elected candidates who are not elected to fill the periodical vacancies are deemed to be elected to fill the casual vacancies for the unexpired balance of the term annexed to those vacancies.

The following is the present electoral method of choosing senators :—

(1.) In a Senate election a voter must mark his vote on his ballot-paper as follows :—

- (a) where his ballot-paper is a ballot-paper in accordance with Form E in the Schedule to the Electoral Act—by making a cross in a square opposite the name of each candidate for whom he votes ;



- (b) where he votes at a polling place on polling day in accordance with the regulations relating to absent voting—in the manner prescribed by those regulations ; and
  - (c) where he votes by post under the provisions of Part XII. of the Act—in the manner prescribed by the regulations relating to voting by post.
- (2.) In a Senate election a voter must vote for the full number of candidates to be elected.

Application of State laws.

10. Until the Parliament otherwise provides, but subject to this Constitution, the laws in force in each State, for the time being, relating to elections for the more numerous House of the Parliament of the State shall, as nearly as practicable, apply to elections<sup>27</sup> of senators for the State.

§ 27. “ELECTIONS OF SENATORS.”

LEGISLATION.

COMMONWEALTH ELECTORAL ACT 1902-1911.

COMMONWEALTH ELECTORAL ACT 1918.

The Commonwealth Electoral Act 1902-1911 made general arrangements for the election of senators concurrently with the election of members of the House of Representatives ; for the preparation of rolls of electors one common roll being used ; for the nomination of candidates ; for the conduct of the polling ; the Senate electors voting in each State as one electorate ; voting by ballot in the polling booths ; voting by post and absent voting out of the polling booth ; the scrutiny ; the return of the writs ; limitation of electoral expenses ; the prohibition of bribery, undue influence and certain acts constituting electoral offences. Voting by post was abolished by an Act passed in 1911 and was restored by the Act of 1918 ; the absent voting out of a polling place provisions are omitted.

Failure to choose senators.

11. The Senate may proceed to the despatch of business, notwithstanding the failure of any State to provide for its representation in the Senate.

## Issue of writs.

12. The Governor of any State may cause writs<sup>28</sup> to be issued for elections of senators for the State. In case of the dissolution of the Senate the writs shall be issued within ten days from the proclamation of such dissolution.

## § 28. "WRITS TO BE ISSUED."

## LEGISLATION.

COMMONWEALTH ELECTORAL ACT 1902-1911, SECTIONS 86-90.

COMMONWEALTH ELECTORAL ACT 1918, SECTIONS 59; 60; 62; 65.

SENATE ELECTIONS ACT 1903, SECTION 7.

Writs for the elections of senators and members of the House of Representatives may be in the forms prescribed in the schedule of the Electoral Act, and they fix the dates for the nomination, the polling, and the return. The writs for return of senators are addressed to the Commonwealth electoral officer for the State in which the election is to be held. Writs for the election of members of the House of Representatives are addressed to the respective divisional returning officers for the divisions in which the elections are to be held.

Rotation of senators.<sup>29</sup>

13. As soon as may be after the Senate first meets, and after each first meeting of the Senate following a dissolution thereof, the Senate shall divide the senators chosen for each State into two classes, as nearly equal in number as practicable; and the places of the senators of the first class shall become vacant at the expiration of [the third year], **three years**, and the places of those of the second class at the expiration of [the sixth year], **six years**, from the beginning of their term of service; and afterwards the places of senators shall become vacant at the expiration of six years from the beginning of their term of service.

The election to fill vacant places shall be made [in the year at the expiration of which] **within one year before** the places are to become vacant.

For the purposes of this section the term of service of a senator shall be taken to begin on the first day of [January] **July** following the day of his election, except in the cases of the first election and of the election next after any dissolution of the Senate, when it shall be taken to begin on the first day of [January] **July** preceding the day of his election.

### § 29. "ROTATION OF SENATORS."

#### LEGISLATION.

##### CONSTITUTION ALTERATION (SENATE ELECTIONS) 1906.

The above reprint of the Constitution, section 13, shows how the section stood as originally passed into law by the Imperial Parliament and as it now stands amended by the Constitution Alteration (Senate Elections) 1906. The words in brackets have been repealed and the amendments are shown in broad black letters. The amending Act *inter alia* reads as follows :—

(a) The terms of service of the senators whose places would, but for this Act, become vacant at the expiration of the year One thousand nine hundred and nine are extended until the thirtieth day of June One thousand nine hundred and ten.

(b) The terms of service of the senators whose places would, but for this Act, become vacant at the expiration of the year One thousand nine hundred and twelve are extended until the thirtieth day of June One thousand nine hundred and thirteen.

(c) This Act shall not be taken to alter the time of beginning of the term of service of any senator elected in the year One thousand nine hundred and six.

This was the first proposed alteration of the Constitution of the Commonwealth submitted to the electors for ratification or rejection. The votes recorded in the affirmative and the negative are given on page 20 of this work.

#### Further provision for rotation.

14. Whenever the number of senators for a State is increased or diminished, the Parliament of the Commonwealth may make such provision for the vacating

of the places of senators for the State as it deems necessary to maintain regularity in the rotation.

Casual vacancies.

15. If the place of a senator becomes vacant<sup>30</sup> before the expiration of his term of service, the Houses of Parliament of the State for which he was chosen shall, sitting and voting together, choose a person to hold the place until the expiration of the term, or until the election of a successor as hereinafter provided, whichever first happens. But if the Houses of Parliament of the State are not in session at the time when the vacancy is notified, the Governor of the State, with the advice of the Executive Council thereof, may appoint a person to hold the place until the expiration of fourteen days after the beginning of the next session of the Parliament of the State, or until the election of a successor, whichever first happens.

At the next general election of members of the House of Representatives, or at the next election of senators for the State, whichever first happens, a successor shall, if the term has not then expired, be chosen to hold the place from the date of his election until the expiration of the term.

The name of any senator so chosen or appointed shall be certified by the Governor of the State to the Governor-General.

§ 30. "IF THE PLACE OF A SENATOR BECOMES VACANT."

LEGISLATION.

COMMONWEALTH ELECTORAL ACT 1902-1911, SECTION 192.

COMMONWEALTH ELECTORAL ACT 1918, SECTION 183.

SENATE ELECTIONS ACT 1903.

A casual vacancy means a vacancy in the place of a Senator occurring before the expiration of his term, as by death or resignation. A periodical vacancy is one occurring at the expiration of

the term of a senator. When at an election of senators for a State to fill periodical vacancies one or more senators are to be elected to fill casual vacancies the provisions of the Act apply. The election of Senators to fill the periodical vacancies and of senators to fill the casual vacancies shall be conducted as one election of senators. The number of candidates required to be elected at the election shall be the whole number required to fill the periodical and the casual vacancies. Those of the elected candidates, to the number of the periodical vacancies, who receive the greatest number of votes shall be elected to fill the periodical vacancies. In the event of an equality of votes between two or more elected candidates, not all of whom can be elected to fill the periodical vacancies, the Commonwealth electoral officer for the State shall give a casting vote for the purpose of deciding which of them shall be elected to fill the periodical vacancies. The elected candidates who are not elected to fill the periodical vacancies shall be elected to fill the casual vacancies.

The Commonwealth electoral officer shall—(a) in declaring the result of the election, declare the names of the candidates elected to fill periodical vacancies, and the names of the candidates elected to fill casual vacancies ; (b) in certifying by endorsement on the original writ the names of the candidates elected, certify which of them are elected to fill periodical vacancies, and which of them are elected to fill casual vacancies.

### **Casual Vacancies.**

At the end of the year 1906 the places of three of the senators for South Australia became vacant by effluxion of time under the provisions of section 13 of the Constitution. An election was held in due course, and three persons (Sir J. SYMON, WM. RUSSELL and JOSEPH VARDON) were returned as duly elected. Upon a petition, presented to the Court of Disputed Returns under the provisions of the Commonwealth Electoral Act 1902 it was declared that the election was void so far as regarded one of them (Joseph Vardon). Thereupon both Houses of the Parliament of South Australia, assuming to act under the provisions of the Constitution, section 15, sat together and chose a person (Mr. J. V. O'LOUGHLIN) to hold the place of the senator whose place had become vacant ; this choice was certified by the Governor, and the person so chosen sat and voted as a senator.

An application was made to the High Court on behalf of Mr. Vardon for a prerogative writ of mandamus addressed to the Governor of the State of South Australia, commanding him to cause a writ to be issued for the election of a senator to fill a vacancy.

The applicant (Mr. Vardon) contended that the case was not within the Constitution, section 15, and that the attempted choice of the Houses of Parliament was a mere nullity. He maintained that when the election of a senator elected at a popular election becomes ineffective for any reason, a new popular election must be held, for which purpose the Governor of the State is bound to cause a writ to be issued, and that the performance of this duty may be enforced by mandamus.

On behalf of the Governor of South Australia it was contended that section 15 applies to all cases in which there has been an election *de facto*, and that in such a case every person returned has a term of service, which may expire with the declaration of the Court of Disputed Returns that he was not duly elected; that, since challengeable elections become unchallengeable at the expiration of the time allowed for petitioning, an irregular election is voidable and not void, and that the words "the place of a senator" in section 15 consequently mean the place *de facto* occupied, whether *de jure*, or not; that, whatever may be the proper mode of choosing a senator under the circumstances, a mandamus will not lie against the Governor of a State.

The High Court (*per* Mr. Justice BARTON), said:—"That with regard to the election of senators, although the Governor is the person designated to bring into operation certain provisions of the Constitution which ought to be brought into operation, and which cannot be brought into operation without his action, he cannot be regarded *quoad hoc* as an officer of the Commonwealth. The States are not subordinate to the Commonwealth, and the Commonwealth judiciary cannot command the constitutional head of a State to do in that capacity an act which is primarily a State function. If, indeed, this Court could in any case undertake to command the necessary steps to be taken to secure the full representation of a State in the Senate, it is not easy to see why its authority should be limited to the case where the mode of choice alleged to be appropriate is a popular election. There are, in fact, three modes in which the place of a senator may be filled—popular election, choice by both

Houses of Parliament, and appointment by the Governor with the advice of the Executive Council. In a case where the choice ought to be made by both Houses of Parliament it is quite clear that this Court could not command those Houses to meet and choose a senator, and it would be immaterial whether a writ had or had not been issued by the Governor for holding a popular election. It is equally clear that the Governor could not be commanded to do an act which he can only do with the advice of the Executive Council. As, therefore, this Court would have no authority to correct by mandamus a mistake of one kind as to the mode of choice, it seems clear that it was not intended to have authority to interfere by mandamus in such matters at all.

“ Apart from these considerations we think that a mandamus will not lie to the Governor of a State to compel him to do an act in his capacity of Governor. There is, of course, no British precedent for such a writ. Reference was made in argument to the cases in which it has been held that an action will lie against a Colonial Governor for wrongful acts done by him. But it by no means follows that, because a Governor is liable to an action for a wrongful act done by him to the prejudice of an individual, he is liable to be commanded by mandamus to repair an omission to do a lawful act.

“ It is settled law that a mandamus will not lie against an officer of the Crown to compel him to do an act which he ought to do as agent for the Crown, unless he also owes a separate duty to the individual seeking the remedy. We do not think that the Governor of a State in the issuing of a writ for the election of senators is acting as agent for the Sovereign in this sense, since the duty imposed by the Constitution is imposed by Statute law and not by delegation from the Sovereign himself. But, as already pointed out, it is a duty cast upon him as head of the State. And the same reasons which prevent a Court of law from ordering the Sovereign to perform a constitutional duty are applicable to a case where it is alleged that the constitutional head of a State has by his omission failed in the performance of a duty imposed on him as such head of the State.

“ In our opinion the Governor of a State is not, so far as regards the matter now in question, an officer of the Commonwealth within the meaning of the section. Nor do we think that the Judiciary Act has enlarged the jurisdiction of the Court in this respect.

"For these reasons we hold that the application fails. We refrain from expressing any opinion upon the other important and difficult question which the applicant desires to have decided. It seems to be clear that the question whether there is or is not now a vacancy in the representation of South Australia in the Senate is one of the questions to be decided by the Senate under the Constitution, section 47 'unless the Parliament otherwise provides' Parliament can, no doubt, confer authority to decide such a question upon this Court, whether as a Court of Disputed Returns or otherwise. But until the question is regularly raised for decision we reserve our opinion upon it": *The King v. The Governor of the State of South Australia*, (1907) 4 C.L.R., at pp. 1506-1513.

Subsequently on a petition to the Senate, removed into the High Court as the Court of Disputed Returns under section 2 of the Disputed Elections and Qualifications Act 1907, it was held, that the vacancy existing after the declaration by the Court of Disputed Returns was not a vacancy arising in the place of a senator before the expiration of his term of office within the meaning of section 15 of the Constitution, and, therefore, the choice or election of a Senator by the State Parliament was null and void: *Vardon v. O' Loughlin*, 5 C.L.R., 201.

#### Qualifications of senator.

16 The qualifications<sup>31</sup> of a senator shall be the same as those of a member of the House of Representatives

### § 31. "QUALIFICATIONS OF A SENATOR."

#### LEGISLATION.

##### COMMONWEALTH FRANCHISE ACT 1902.

COMMONWEALTH ELECTORAL ACT 1902-11, SECTIONS 95, 96, 206, (a).

COMMONWEALTH ELECTORAL ACT 1918, SECTIONS 39, 69, 70, 211.

To entitle a person to be nominated as a senator or a member of the House of Representatives, he must be qualified under the Constitution, section 34, to be elected as a senator or a member of the House of Representatives. A disqualification provided by the Act of 1902-11, section 96, is re-enacted, viz., "No person who is at the date of nomination, or who was at any time



within 14 days prior to the date of nomination a member of the Parliament of a State, shall be capable of being nominated as a senator, or a member of the House of Representatives." Re-enacted in section 70 of the Act of 1918.

Election of President.

17. The Senate shall, before proceeding to the despatch of any other business, choose a senator to be the President of the Senate ; and as often as the office of President becomes vacant the Senate shall again choose a senator to be the President.

The President shall cease to hold his office if he ceases to be a senator. He may be removed from office by a vote of the Senate, or he may resign his office or his seat by writing addressed to the Governor-General.

Absence of President.

18. Before or during any absence of the President, the Senate may choose a senator to perform his duties in his absence.

Resignation of senator.

19. A senator may, by writing addressed to the President, or to the Governor-General if there is no President or if the President is absent from the Commonwealth, resign his place, which thereupon shall become vacant.

Vacancy by absence.

20. The place of a senator shall become vacant if for two consecutive months of any session of the Parliament he, without the permission of the Senate, fails to attend the Senate.

Vacancy to be notified.

21. Whenever a vacancy happens in the Senate, the President, or if there is no President or if the President is absent from the Commonwealth the

Governor-General, shall notify the same to the Governor of the State in the representation of which the vacancy has happened.

Quorum.

22. Until the Parliament otherwise provides, the presence of at least one-third of the whole number of the senators shall be necessary to constitute a meeting of the Senate for the exercise of its powers.

Voting in Senate.

23. Questions arising in the Senate shall be determined by a majority of votes, and each senator shall have one vote. The President shall in all cases be entitled to a vote; and when the votes are equal the question shall pass in the negative.

PART III.—THE HOUSE OF REPRESENTATIVES.

Constitution of House of Representatives.

24. The House<sup>32</sup> of Representatives shall be composed of members directly chosen by the people of the Commonwealth, and the number of such members shall be, as nearly as practicable, twice the number of the senators.

The number of members chosen<sup>33</sup> in the several States shall be in proportion to the respective numbers of their people, and shall, until the Parliament otherwise provides, be determined, whenever necessary, in the following manner:—

- (i.) A quota shall be ascertained by dividing the number of the people of the Commonwealth, as shown by the latest statistics of the Commonwealth, by twice the number of the senators:
- (ii.) The number of members to be chosen in each State shall be determined by dividing the

number of the people of the State, as shown by the latest statistics of the Commonwealth, by the quota; and if on such division there is a remainder greater than one-half of the quota, one more member shall be chosen in the State.

But notwithstanding anything in this section, five members at least shall be chosen in each Original State.

### § 32. "THE HOUSE OF REPRESENTATIVES."

The House of Representatives is one of the two Chambers of the legislative organization of the Federal Government. It is intended to give particular force and expression to the national principle of the Commonwealth. In that Assembly, the Convention which drafted the Constitution, hoped that the national principle would find full scope and representation tending in the direction of the consolidation of the people of Commonwealth into one integrated whole, irrespective of State boundaries. In its constitution it represents the "people of the Commonwealth" as distinguished from "the people of the States." The natural bent, inclination and policy of such a House will therefore be to regard its constituents as one united people; one in community in rights and interests; one in their title to equal justice and to the equal protection of law; one in their claim to fair and beneficent treatment; one in destiny. On the other hand the design of the Constitution was that the Senate and the High Court would tend to check any unconstitutional encroachments on the reserved realm of provincial autonomy.

### § 33. "THE NUMBER OF MEMBERS CHOSEN IN THE SEVERAL STATES."

#### LEGISLATION.

#### REPRESENTATION ACT 1905.

For the purpose of determining the number of members of the House of Representatives to be chosen from time to time in the several States, it is the duty of the Chief Electoral Officer of the Commonwealth at the times and in the manner prescribed by this Act to ascertain the numbers of the people of the Commonwealth and the numbers of the people of the several States.

A day to be called Enumeration Day is to be appointed by the chief electoral officer after the first census taken on the 3rd of April 1911, and at the expiration of every fifth year after the then last preceding Enumeration Day. On any appointed Enumeration Day the numbers of the people of the Commonwealth are ascertained in the prescribed manner and thereupon the Chief Electoral Officer makes and forwards to the Minister a certificate in accordance with the form prescribed. Immediately after the issue of the certificate, the Chief Electoral Officer proceeds to determine the number of members of the House of Representatives to be chosen in the several States. For the purpose of determining such numbers the following procedure is to be followed :—

- (a) A quota shall be ascertained by dividing the number of people of the Commonwealth, as shown by the certificate (for the time being in force) of the Chief Electoral Officer, by twice the number of senators.
- (b) The number of members to be chosen in each State shall, subject to the Constitution, be determined by dividing the number of the people of the State, as shown by the certificate (for the time being in force) of the Chief Electoral Officer, by the quota ; and if on such division there is a remainder greater than one-half of the quota, one more member shall be chosen in the State.

The Chief Electoral Officer, after having determined the number of members of the House of Representatives to be chosen in the several States in accordance with the Act is required to make and forward to the Minister a notification setting forth the number of members of the House of Representatives to be chosen in the several States.

In pursuance of any such certificate an alteration may be made in the number of members of the House of Representatives, but such alteration shall not affect any election held before the State has been redistributed into electoral divisions pursuant to the certificate ; nor to any election to fill a vacancy in the House elected before such redistribution. Any such redistribution will only affect any general election after it has been made.

Provision as to races disqualified from voting.

25. For the purposes of the last section, if by the law of any State all persons of any race are disqualified

from voting at elections for the more numerous House of the Parliament of the State, then, in reckoning the number of people of the State or of the Commonwealth, persons of that race resident in that State shall not be counted.

Representatives in first Parliament.

26. Notwithstanding anything in section twenty-four, the number of members to be chosen<sup>34</sup> in each State at the first election shall be as follows:—

New South Wales	..	twenty-three ;
Victoria	..	twenty ;
Queensland	..	eight ;
South Australia	..	six ;
Tasmania	..	five ;

Provided that if Western Australia is an Original State, the numbers shall be as follows:—

New South Wales	..	twenty-six ;
Victoria	..	twenty-three ;
Queensland	..	nine ;
South Australia	..	seven ;
Western Australia	..	five ;
Tasmania	..	five.

**§ 34. "THE NUMBER OF MEMBERS CHOSEN IN EACH STATE."**

In the last redistribution of seats under the Representation Act 1905, made in the year 1911, the following members were assigned to the several States.

State	Number of Representatives.
New South Wales	.. 27
Victoria ..	.. 21
Queensland	.. 10
South Australia	.. 7
Western Australia	.. 5
Tasmania	.. 5
Total	.. <u>75</u>

## Alteration of number of members.

27. Subject to this Constitution, the Parliament may make laws for increasing or diminishing the number of the members of the House of Representatives.

## Duration of House of Representatives.

28. Every House of Representatives shall continue for three years from the first meeting of the House, and no longer, but may be sooner dissolved by the Governor-General.

## Electoral divisions.

29. Until the Parliament of the Commonwealth otherwise provides, the Parliament of any State may make laws for determining the divisions<sup>35</sup> in each State for which members of the House of Representatives may be chosen, and the number of members to be chosen for each division. A division shall not be formed out of parts of different States.

In the absence of other provision, each State shall be one electorate.

## § 35. "DIVISIONS IN EACH STATE."

## LEGISLATION.

COMMONWEALTH ELECTORAL ACT 1902-1911, SECTIONS 12-23.

COMMONWEALTH ELECTORAL ACT 1918, SECTIONS 15-25.

Each State is distributed into electoral divisions, equal in number to the number of members of the House of Representatives to be chosen for the State and one member is chosen for each division. The work of distributing a State into divisions under the Act is assigned to "distribution commissioners," one of them is the Chief Electoral Officer or an officer having similar qualifications and if his services are obtainable, one must be the Surveyor-General of the State or an officer having similar qualifications. For the purposes of the Act the Chief Electoral Officer whenever necessary ascertains a quota for each State; the whole number of electors in each State is divided by the number of members of the House of Representatives to be chosen for the State.

In making any proposed distribution of a State into Divisions the Distribution Commissioners shall give due consideration to—

- (a) Community or diversity of interest,
- (b) Means of communication,
- (c) Physical features,
- (d) Existing boundaries of Divisions and Subdivisions,
- (e) State electoral boundaries ;

and subject thereto the quota of electors shall be the basis for the distribution, and the Distribution Commissioners may adopt a margin of allowance, to be used whenever necessary, but in no case shall the quota be departed from to a greater extent than one-fifth more or one-fifth less.

Qualification of electors.

30. Until the Parliament otherwise provides, the qualification of electors<sup>86</sup> of members of the House of Representatives shall be in each State that which is prescribed by the law of the State as the qualification of electors of the more numerous House of Parliament of the State ; but in the choosing of members each elector shall vote only once.

§ 36. "QUALIFICATION OF ELECTORS."

LEGISLATION.

COMMONWEALTH FRANCHISE ACT 1902.

COMMONWEALTH WAR TIME ELECTORAL ACT 1917.

The qualifications of electors of members of the House of Representatives are the same as those required for electors of senators, viz., manhood and womanhood suffrage, or during the war, and for three years thereafter, membership of the Forces as defined by War Time Electoral Act 1917 ; natural born or naturalized British subjects ; six months' continuous residence in Australia, enrolment on the electoral roll for the electoral division in which they reside. The disqualifications are the same as those of a Senate elector : see notes to section 8, p. 240.

The War Time Electoral Act 1917 provides that subject to certain exceptions, every naturalized British subject who was born in an enemy country shall be disqualified for voting at Commonwealth elections during the war or within six months thereafter. But a person claiming to vote who was

a natural born citizen or subject of France, Italy or Denmark, and who arrived in Australia before the date upon which the territory in which he was born became part of Germany or Austria, as the case may be, he is not deemed to have been born in an enemy country, if he produces to the electoral officer a certificate in the prescribed form.

The foregoing disabilities do not, however, apply to prevent any of the following persons from voting :—

- (a) any member of the forces who is serving outside Australia ;
- (b) any person who is or has been a member of the forces or who has applied for enlistment as a member of the forces and who has been rejected as medically unfit for service or who is a parent or the wife, brother or sister of a person or who is or has been a member of the forces or of a person who has so applied and has been rejected ;
- (c) any person who satisfies the presiding officer that he is a Christian and is either an Assyrian or an Armenian.

#### Application of State laws.

31, Until the Parliament otherwise provides, but subject to this Constitution, the laws in force in each State for the time being relating to elections for the more numerous House of the Parliament of the State shall, as nearly as practicable, apply to elections<sup>37</sup> in the State of members of the House of Representatives.

### § 37. "ELECTION OF MEMBERS OF THE HOUSE OF REPRESENTATIVES."

#### LEGISLATION.

COMMONWEALTH ELECTORAL ACT 1902-1911.

COMMONWEALTH ELECTORAL WAR TIME ACT 1917.

COMMONWEALTH ELECTORAL ACT 1918.

These earlier Acts, now consolidated in the Act of 1918, provided for the appointment of a Chief Electoral Officer for the Commonwealth, a Commonwealth Electoral Officer for each State, returning officers, electoral registrars and other officers. Each State was distributed into electoral divisions equal in number to the members



of the House of Representatives to be chosen therein and there was to be one member of the House of Representatives chosen in each electoral division. Rolls of the electors enrolled in each division in each State were to be prepared and printed. Arrangements were made for the enrolment of voters, the issue of the writs, the conduct of elections ; voting by post, absent voting, proceeding on the day of polling ; vote by secret ballot in the polling booths ; counting the votes ; return of the writs ; limitation of election expenses incurred by candidates—£250 in a Senate election and £100 in a House election ; the prohibition of certain acts, such as bribery, treating, undue influence and the creation of a Court of Disputed Returns.

In 1911 the whole of Part X. of the principal Act relating to voting by post was repealed. The Electoral Act 1902-11 remained in force till it was superseded by the Commonwealth Electoral Act 1918 (Consolidated). This Act restored voting by post and introduced a system of preferential voting, that is, voting for candidates in the order of preference indicated by the figures 1, 2, 3, etc., in connection with elections for the House of Representatives.

The method of voting in elections for the House of Representatives, as amended by section 124 of the Act of 1918, is as follows :—

In a House of Representatives election a voter shall mark his vote on his ballot-paper as follows :—

- (a) where his ballot-paper is a ballot-paper in accordance with Form F in the Schedule—he shall place the number 1 in the square opposite the name of the candidate for whom he votes as his first preference, and shall give contingent votes for all the remaining candidates by placing the numbers 2, 3, 4 (and so on, as the case requires) in the squares opposite their names so as to indicate the order of his preference for them ;
- (b) where he votes at a polling place on polling day in accordance with the regulations relating to absent voting—he shall mark his vote on his ballot-paper in the manner prescribed by those regulations ; and
- (c) where he votes by post under the provisions of Part XII. of the Act—he shall mark his vote on his ballot-paper

in the manner prescribed by the regulations relating to voting by post.

Absent voting before a Registrar out of a polling booth is abolished.

Writs for general election.

32. The Governor-General in Council may cause writs<sup>38</sup> to be issued for general elections of members of the House of Representatives.

After the first general election, the writs shall be issued within ten days from the expiry of a House of Representatives or from the proclamation of a dissolution thereof.

**§ 38. "WRITS FOR GENERAL ELECTIONS OF MEMBERS."**

LEGISLATION.

COMMONWEALTH ELECTORAL ACT 1902-1911, SECTIONS 86-89, 91-93.

COMMONWEALTH ELECTORAL ACT 1918, SECTIONS 61-67.

Writs for vacancies.

33. Whenever a vacancy happens in the House of Representatives, the Speaker shall issue his writ for the election of a new member, or if there is no Speaker or if he is absent from the Commonwealth the Governor-General in Council may issue the writ.

Qualifications of members.

34. Until the Parliament otherwise provides, the qualifications<sup>39</sup> of a member of the House of Representatives shall be as follows:—

- (i.) He must be of the full age of twenty-one years, and must be an elector entitled to vote at the election of members of the House of Representatives, or a person qualified to become such elector, and must have been

for three years at the least a resident within the limits of the Commonwealth as existing at the time when he is chosen :

- (ii.) He must be a subject of the Queen, either natural-born or for at least five years naturalized under a law of the United Kingdom, or of a Colony which has become or becomes a State, or of the Commonwealth, or of a State.

**§ 39. "QUALIFICATION."**

As to the disqualification of State members, see note to section 16, page 249.

*Election of Speaker.*

35. The House of Representatives shall, before proceeding to the despatch of any other business, choose a member to be the Speaker of the House, and as often as the office of Speaker becomes vacant the House shall again choose a member to be the Speaker.

The Speaker shall cease to hold his office if he ceases to be a member. He may be removed from office by a vote of the House, or he may resign his office or his seat by writing addressed to the Governor-General.

*Absence of Speaker.*

36. Before or during any absence of the Speaker, the House of Representatives may choose a member to perform his duties in his absence.

*Resignation of member.*

37. A member may by writing addressed to the Speaker, or to the Governor-General if there is no Speaker or if the Speaker is absent from the Commonwealth, resign his place, which thereupon shall become vacant.

## Vacancy by absence.

38. The place of a member shall become vacant if for two consecutive months of any session of the Parliament he, without the permission of the House, fails to attend the House.

## Quorum.

39. Until the Parliament otherwise provides, the presence of at least one-third of the whole number of the members of the House of Representatives shall be necessary to constitute a meeting of the House for the exercise of its powers.

## Voting in House of Representatives.

40. Questions arising in the House of Representatives shall be determined by a majority of votes other than that of the Speaker. The Speaker shall not vote unless the numbers are equal, and then he shall have a casting vote.

## PART IV.—BOTH HOUSES OF THE PARLIAMENT.

## Right of electors of States.

41. No adult person who has or acquires a right<sup>40</sup> to vote at elections for the more numerous House of the Parliament of a State shall, while the right continues, be prevented by any law of the Commonwealth from voting at elections for either House of the Parliament of the Commonwealth.

## § 40. "RIGHT OF ELECTORS OF STATES."

## LEGISLATION.

COMMONWEALTH FRANCHISE ACT 1902, SECTION 4.

COMMONWEALTH ELECTORAL ACT 1918, SECTION 39.

## Oath or affirmation of allegiance.

42. Every senator and every member of the House of Representatives shall before taking his seat make and subscribe before the Governor-General, or some

person authorized by him, an oath or affirmation of allegiance in the form set forth in the schedule to this Constitution.

Member of one House ineligible for other.

43. A member of either House of the Parliament shall be incapable of being chosen or of sitting as a member of the other House.

Disqualification.

44. Any person who—

- (i.) Is under any acknowledgement of allegiance, obedience, or adherence to a foreign power, or is a subject or a citizen or entitled to the rights or privileges of a subject or a citizen of a foreign power: or
- (ii.) Is attainted of treason, or has been convicted and is under sentence, or subject to be sentenced, for any offence punishable under the law of the Commonwealth or of a State by imprisonment for one year or longer: or
- (iii.) Is an undischarged bankrupt or insolvent: or
- (iv.) Holds any office of profit under the Crown, or any pension payable during the pleasure of the Crown out of any of the revenues of the Commonwealth: or
- (v.) Has any direct or indirect pecuniary interest in any agreement with the Public Service of the Commonwealth otherwise than as a member and in common with the other members of an incorporated company consisting of more than twenty-five persons:

shall be incapable of being chosen or of sitting as a senator or a member of the House of Representatives.

But sub-section (iv.) does not apply to the office of any of the Queen's Ministers of State for the Commonwealth, or of any of the Queen's Ministers for a State, or to the receipt of pay, half-pay, or a pension by any person as an officer or member of the Queen's navy or army, or to the receipt of pay as an officer or member of the naval or military forces of the Commonwealth by any person whose services are not wholly employed by the Commonwealth.

*Vacancy on happening of disqualification.*

**45. If a senator or member of the House of Representatives—**

- (i.) Becomes subject to any of the disabilities mentioned in the last preceding section: or
- (ii.) Takes the benefit, whether by assignment, composition, or otherwise, of any law relating to bankrupt or insolvent debtors: or
- (iii.) Directly or indirectly takes or agrees to take any fee or honorarium for services rendered to the Commonwealth, or for services rendered in the Parliament to any person or State:

his place shall thereupon become vacant.

*Penalty for sitting when disqualified.*

**46. Until the Parliament otherwise provides, any person declared by this Constitution to be incapable of sitting as a senator or as a member of the House of Representatives shall, for every day on which he so sits, be liable to pay the sum of one hundred pounds to any person who sues for it in any court of competent jurisdiction.**

## Disputed elections.

47. Until the Parliament otherwise provides, any question respecting the qualification of a senator or of a member of the House of Representatives, or respecting a vacancy in either House of the Parliament, and any question of a disputed<sup>41</sup> election to either House, shall be determined by the House in which the question arises.

**§ 41. "DISPUTED ELECTION IN EITHER HOUSE."**

## LEGISLATION.

COMMONWEALTH ELECTORAL ACT 1902-1911, SECTIONS 192-206.

COMMONWEALTH ELECTORAL ACT 1918, SECTIONS 183-202.

## Allowance to members.

48. Until the Parliament otherwise provides, each senator and each member of the House of Representatives shall receive an allowance<sup>42</sup> of four hundred pounds a year, to be reckoned from the day on which he takes his seat.

**§ 42. "ALLOWANCES TO MEMBERS."**

## LEGISLATION.

PARLIAMENTARY ALLOWANCES ACT 1907.

By the amending Act of 1907 members of the Senate and House of Representatives receive an allowance of £600 per year commencing from the date of their election.

## Privileges, &amp;c., of Houses.

49. The powers, privileges,<sup>43</sup> and immunities of the Senate and of the House of Representatives, and of the members and the committees of each House, shall be such as are declared by the Parliament, and until declared shall be those of the Commons House of Parliament of the United Kingdom; and of its members and committees, at the establishment of the Commonwealth.

**§ 43. "POWERS, PRIVILEGES AND IMMUNITIES."**

**LEGISLATION.**

**PARLIAMENTARY PAPERS ACT 1908.**

**Rules and orders.**

50. Each House of the Parliament may make rules and orders with respect to—

- (i.) The mode in which its powers, privileges, and immunities may be exercised and upheld:
- (ii.) The order and conduct of its business and proceedings either separately or jointly with the other House.

**PART V.—POWERS OF THE PARLIAMENT.**

**Legislative powers<sup>44</sup> of the Parliament.**

51. The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect<sup>45</sup> to:—

- (I.) Trade and commerce<sup>46</sup> with other countries, and among<sup>47</sup> the States:

**Conspectus of Notes to Section 51 (1).**

**§44 "LEGISLATIVE POWERS"**

- Plenary nature of powers
- Connotation of terms
- Distribution of powers in the Commonwealth
- The Australian Scheme
- The Canadian Scheme
- Burden of proof of Commonwealth powers
- Origin of Commonwealth powers

**§45 "WITH RESPECT TO"**

**§46 "TRADE AND COMMERCE"**

**LEGISLATION.**

- Sea-Carriage of Goods Act 1904.
- Secret Commission Act 1905.
- Commerce (Trade Descriptions) Act 1905.



Australian Industries Preservation (Anti-Trust) Act 1906.  
 Spirits Act (Description) 1906.  
 Seamen's Compensation Act 1909-1911.  
 Potency of the commerce power.  
 Anti-Trust laws in United States.  
 Monopoly of manufacture.  
 Freight and Traffic Cases.  
 Pipe and Steel Trust Case.  
 Northern Securities Case.  
 The rule of reason.  
 Chicago Meat Trust Case.  
 Tobacco Trust Cases.  
 Standard Oil Case  
 Coal Combine Case in Australia.  
 Labour obstruction to commerce in United States  
 Employers' liability legislation in United States.  
 Safety appliance legislation in United States.  
 Contracting out of liability forbidden.  
 Employers' liability in Australia.  
 Hours of labour in commerce.  
 Membership of trade unions in commerce.  
 Regulation of wages in commerce.  
 General conditions of employment.  
 Importation of goods.  
 Exportation.  
 Maritime contracts.  
 Trade description and grading.  
 Trade marks.  
 Navigation and shipping in relation to commerce.  
 Penal laws in commerce.  
 Inquiries as to inter-state and external commerce.  
 Commerce powers reserved to the States.

§47. "AMONG THE STATES."

Scope for Commonwealth legislation.

Proposed Constitutional amendment of the commerce power.

§ 44. "LEGISLATIVE POWERS."

**Plenary Nature of Commonwealth Powers.**

The legislative powers of the Commonwealth are, within their ambit, plenary, and in reference to their subject matters, are as ample as the powers of the British Parliament by which these powers have been conferred. They are not subject to the limitations of a delegated power. They may be exercised either absolutely or conditionally; that is to say they may impose duties or confer rights in their fullest details or they may pass laws in general terms

subject to conditions and regulations to be prescribed by the Governor-General and Council or by some subordinate authority. (See notes to Constitution, section 1, page 220).

The Commonwealth, within the limits of its statutory authority is a sovereign State and can exercise sovereign powers subject only to the restrictions imposed by the Imperial connection and by the provisions of the Constitution expressed or necessarily implied: *D'Emden v. Pedder*, (1903) 1 C.L.R., at pp. 109-119. It has always been held that under the authority conferred by Colonial Constitutions "to make laws for the peace, order and good Government, etc." with respect to enumerated matters, the Colonial Legislatures have, within the territories subject to their respective jurisdictions, sovereign powers absolute and uncontrolled except as far as they may be restricted by their Constitutions: *Powell v. Apollo Candle Co.*, (1885) 10 App. Cas., 282; *Baxter v. Ah Way*, 8 C.L.R., 626.

The principal legislative powers of the Commonwealth are reinforced by incidental and implied powers. Whilst few of the enumerated powers given to the Commonwealth Parliament convey express authority to legislate concerning contracts, it can, in dealing with assigned subject matters exercise all necessary and incidental powers to pass effective laws. Hence, the power over inter-state and external commerce necessarily authorizes legislation, regulating or forbidding commercial contracts confined to inter-state and external transactions: *The King and the Attorney-General, Commonwealth v. Associated Northern Collieries and the Adelaide S. Co. Ltd.*, (1911) 4 C.L.R., 387.

In the same manner, whilst the Commonwealth Parliament has no general jurisdiction to deal with torts or crimes it can as a matter of necessary implication forbid offences against the laws of the Commonwealth and impose penalties for disobedience. In the wide sphere of the defence power there is scarcely any limit to the Federal authority, civil and penal; the Commonwealth Crimes Act (1914) provides that any person convicted of treason shall be liable to the death penalty.

The legislative power of the Commonwealth includes the option to pass retrospective civil and criminal laws relating to enumerated subjects. It can validate an unauthorized or mistaken collection of customs duties; ante-dating or making new duties

to operate retrospectively : *Colonial Sugar Refining Co. Ltd. v. Irving*, (1903) Q.S.R., 261 ; affirmed by the Privy Council, (1905) A.C., 369.

It may pass penal laws making them operate retrospectively, penalising acts which were innocent at the time of their commission : *The King v. Kidman*, 20 C.L.R., pp. 435-460.

### Connotation of Terms.

The meaning of the terms used in the Constitution, such as trade, commerce, patents, etc., must be ascertained by their signification as understood in the year 1900 when the Constitution came into force. The Commonwealth Parliament cannot define or enlarge constitutional powers. It is bound by the meaning of powers as it must have been contemplated by the framers of the Constitution. It cannot call a thing a trade mark which was not known as a trade mark in the year 1900. Whilst the powers granted do not change, they apply from generation to generation to all things to which they are, in their nature, reasonably applicable : *Per BREWER, J. in South Carolina v. The United States*, 199 U.S., at p. 438.

“ On the other hand, it must be remembered that with advancing civilization new developments, now unthought of, may arise with respect to many subject matters. So long as those new developments relate to the same subject matter the powers of the Parliament will continue to extend to them. For instance, I cannot doubt that the power of the Legislature as to posts and telegraphs and telephones, extends to wireless telegraphy and to any future discoveries of a like kind, although in detail they may be very different from posts and telegraphs and telephones as known in the nineteenth century. An instance of a quite different kind of subject matter is immigration, the meaning of which term cannot alter, however the method of bringing persons within the geographical limits of the Commonwealth may be extended ” : *Per GRIFFITH, C.J. Attorney-General for New South Wales v. Brewery Employees*, 6 C.L.R., at p. 501. See also *per BARTON, J., ib.* at pp. 521-2 ; *per O'CONNOR, J., ib.*, at pp. 534-5.

### Distribution of Powers in the Commonwealth.

One of the fundamental features of the Federal Constitution, and the one which has been the subject of most controversy and most judicial decisions is the system of distribution of legislative powers

between the Parliament of the Commonwealth and the State Parliaments. To effect such a distribution under a Federal Constitution, it is necessary to divide the possible field of legislation by description of the various subject matters.

Generally speaking, the Australian Constitution, following the model of the Constitution of the United States, has given specific subject matters to the Federal Parliament and the residue of possible subject matters to the State Parliaments. This method of distribution leaves the States a mass of exclusive powers which cannot be invaded or interfered with by the Federal authority and it also leaves to the States, in addition to their exclusive powers, certain concurrent powers as to matters within in the Federal sphere to pass laws not inconsistent with Federal laws.

#### **Australian Scheme.**

“The scheme of the Australian Constitution, like that of the Constitution of the United States, is to confer certain definite and specified powers upon the Commonwealth, and to leave the residue of power in the hands of the States. This is expressed in our Constitution by the language of sections 51 and 52, which confer the Federal power, and section 107, which provides that ‘Every power of the Parliament of a Colony which has become or becomes a State, shall, unless it is by this Constitution exclusively vested in the Parliament of the Commonwealth, or withdrawn from the Parliament of the State, continue as at the establishment of the Commonwealth.’ In the American Constitution it is expressed in the words of the Tenth Amendment:—‘The powers not delegated to the United States by the Constitution, nor prohibited to it by the States, are reserved to the States respectively, or to the people.’ In our judgment the schemes of these two Constitutions are, in this respect, identical. In neither case is any new power conferred upon the States, nor is there any exclusive distribution of powers, except as to a limited class of cases.” *Per GRIFFITH, C.J., Deakin v. Webb*, 1 C.L.R., at p. 605. See also *Baxter v. Commissioner of Taxation*, 4 C.L.R., at pp. 1109-13, 1126.

#### **Canadian Scheme.**

“The scheme of the Canadian Constitution, which was rejected by the framers of this Constitution, is essentially different. An attempt was made in the British North America Act, by which the

powers of the Dominion and the Provinces are conferred, to enumerate all possible subjects of legislation, and to distribute them between the Dominion and the Provinces, giving the power in each case to the one authority to the exclusion of the other. It follows that every power of legislation must reside in one authority or the other, and if it cannot be exercised by the authority on whom it is conferred in express terms, it cannot be exercised at all." *Per* GRIFFITH, C.J., *Deakin v. Webb*, 1 C.L.R., at pp. 605-6. See also *Baxter v. Commissioner of Taxation*, 4 C.L.R., at pp. 1109-13, 1126; *The King v. Barger*, 4 C.L.R., at p. 69; *Australian Boot Trade Employees v. Whybrow*, 10 C.L.R., at pp. 291-3.

### **Burden of Proof of Commonwealth Powers.**

"At the time of Federation the federating Colonies possessed full powers, delegated to them by the Imperial Parliament, of legislating for the peace, order, and good government of their people. It is clear that the powers which the Royal Commissions Acts affect to exercise, of imposing, under penalties, new duties on the subjects or people residing within the individual States, were before Federation vested in the legislatures of these States. If so, the burden rests on those who affirm that the capacity to pass these Acts was put within the powers of the Commonwealth Parliament to show that this was done. In order to see whether this burden can be discharged, it is necessary to look closely at the wording of section 51." *Per* Viscount HALDANE, L.C. in the *Attorney-General of the Commonwealth v. Colonial Sugar Refining Co. Ltd.*, (1913) 17 C.L.R., at p. 649.

### **Origin of Commonwealth Powers.**

In the *Royal Commissions Case*, Viscount HALDANE, L.C., delivering the judgment of the Board, said:—"Their Lordships will now examine the Commonwealth of Australia Constitution Act in the light of these observations with a view to answering the questions whether the Royal Commissions Acts of the Australian Parliament were within the powers which by this instrument were transferred by the federating Colonies to the new Central Parliament": 17 C.L.R., at p. 653.

In this passage the Lord Chancellor promulgated the doctrine of interpretation that the Commonwealth Parliament possessed only

powers which had been delegated to it by the States. In another passage his Lordship said :—" Their Lordships are called on to interpret the legislative compact made between the Commonwealth and the States, and they have to determine on the language of the Statute what rights of legislation the federating Colonies declared to be reserved to themselves." Exception has been taken by federalists in Australia to this doctrine, that the Commonwealth can only exercise delegated powers. In an official statement made on 26th March, 1914, shortly after the receipt in Australia of a copy of the judgment of the Privy Council, Sir WILLIAM IRVINE, K.C., the then Attorney-General of the Commonwealth, said that the Privy Council had put forward as one of the main principles for the interpretation of the Constitution that the Federal Parliament possessed only powers which had been delegated by the States. He dissented from that view, and he thought that most Australians acquainted with the history of Australia would agree with him when he repudiated the idea that the power of the Federal Parliament had been delegated by the States. The Commonwealth powers had originated from the same source as those of the States namely, from the Imperial Parliament ; but a far more important ground of the decision was that which placed a narrow limit on what were known as the incidental powers of the Commonwealth : *The Argus*, 26th March, 1914.

The Constitution, section 51 (xxxvii.) affords an illustration of powers which may be referred to as delegated by the States to the Commonwealth, but no such reference or delegation has yet been made by the States.

#### § 45. " WITH RESPECT TO."

Parliament has power to make laws " with respect to the following matters." The form of words used in our Constitution—the power to make laws " with respect to " any given subject—is wider in meaning than the form of words used in the Constitution of the United States—power (*e.g.*) " to lay and collect taxes," or power " to borrow money on the credit of the United States."

Applying this rule of construction His Honor said :—" In my opinion, the prohibition of strikes is a law ' with respect to ' the subject of pl. xxxv." *Per HIGGINS, J. in Stemp v. Australian Glass Manufacturers Co. Ltd.*, (1917) 23 C.L.R., at p. 244.

**§ 46. "TRADE AND COMMERCE."****LEGISLATION.****SEA CARRIAGE OF GOODS (REID-McLEAN) ACT 1904.**

This Act applies only in relation to ships carrying goods from any place in Australia to any place outside Australia, or from one State to another State, and in relation to goods so carried, or received to be so carried, in those ships. It provides that any bill of lading or document containing an agreement relieving the owners, charterers or agents of any ship from liability for loss or damage arising from the improper condition of the ship's hold, or from negligence in loading, stowage, or delivery of goods received to be carried in such ship shall be illegal, null and void ; also that any such bill of lading or document lessening the obligations of the owners or charterers as to the seaworthiness of the ship, or in keeping the ship's hold, refrigerating and cool chambers in sound and safe condition ; also lessening the obligations of the master, officers or agents, or servants of any ship to carefully handle and properly deliver goods, are illegal.

**SECRET COMMISSION (ISAACS) ACT 1905.**

This Act relates to trade and commerce with other countries and among the States, and to agencies of and contracts with the Commonwealth or any Department or office thereof. Any person who, without the full knowledge and consent of the principal, directly or indirectly—(a) being an agent of the principal accepts or obtains or agrees or offers to accept or obtain from any person for himself or for any person other than the principal ; or (b) gives or agrees to give or offers to an agent of the principal or to any person at the request of an agent of the principal any gift or consideration as an inducement or reward—(i.) for any act done or to be done, or any forbearance observed or to be observed, or any favour or disfavour shown or to be shown, in relation to the principal's affairs or business, or on the principal's behalf ; or (ii.) for obtaining or having obtained, or aiding or having aided to obtain for any person an agency or contract for or with the principal, is guilty of an indictable offence. Any person who, being an agent deceives his principal by a false receipt or document is guilty of an indictable offence. Any agent who, secretly buys from or sells to himself any goods for or on behalf of his principal is guilty of an indictable offence.

## COMMERCE (TRADE DESCRIPTIONS) (REID-McLEAN) ACT 1905.

Under this Act regulations may be made prohibiting the importation into Australia of any specified goods unless there is applied to them a trade description of such character, relating to such matters, and applied in such manner, as is prescribed. The regulations may prohibit the exportation of any specified goods, unless there is applied to them a trade description of such character, relating to such matters, and applied in such manner, as is prescribed. The regulations can only apply to the following goods :—Articles used for food or drink by man, or used in the manufacture or preparation of articles used for food or drink by man ; or medicines or medical or medicinal preparations for internal or external use ; manures or apparel (including boots and shoes) and the materials from which such apparel is manufactured ; or jewellery or seeds and plants.

THE AUSTRALIAN INDUSTRIES PRESERVATION (ANTI-TRUST)  
(DEAKIN-ISAACS) ACT 1906.

This Act, founded on the Sherman Act, United States, provided that any person who enters into any contract, or engages in any combination, in relation to trade or commerce with other countries or amongst the States—(a) with intent to restrain trade or commerce to the detriment of the public ; or (b) with intent to destroy or injure by means of unfair competition any Australian industry, the preservation of which is advantageous to the Commonwealth, having due regard to the interests of producers, workers and consumers, is guilty of an offence : section 4.

Any foreign corporation, or trading or financial corporation formed within the Commonwealth, which, either as principal or agent, enters into any contract, or engages in any combination—(a) with intent to restrain trade or commerce within the Commonwealth to the detriment of the public ; or (b) with intent to destroy or injure by means of unfair competition any Australian industry, the preservation of which is advantageous to the Commonwealth, having due regard to the interests of producers, workers, and consumers, is guilty of an offence : section 5.

Any person who monopolizes or attempts to monopolize, or combines or conspires with any other person to monopolize, any part of the trade or commerce with other countries or among the



States, with intent to control, to the detriment of the public, the supply or price of any service, merchandise, or commodity, is guilty of an offence : section 7.

Any foreign corporation, or trading or financial corporation formed within the Commonwealth, which monopolizes or attempts to monopolize, or combines or conspires with any person to monopolize any part of the trade or commerce within the Commonwealth, with intent to control, to the detriment of the public, the supply or price of any service, merchandise, or commodity, is guilty of an offence : section 8.

A number of sections in this Act are designed to prevent the dumping of goods into the Commonwealth under circumstances amounting to unfair competition. Where complaints of dumping are made they may be inquired into by the Comptroller-General of Customs, and if such complaints are found to be *prima facie* sustained, the Minister may refer the matter to a Justice of the High Court for exhaustive investigation. If the Justice determines that the imported goods are being imported with the intent to destroy or injure any Australian industry by their sale or disposal within the Commonwealth in unfair competition with any Australian goods, their importation may be prohibited by proclamation : Part III.

The amending Act of 1908 gives the Comptroller-General power, when he believes an offence has been committed, to require persons to answer questions and produce documents : section 15 (B). The further amending Act of 1909 provides that any person offering or giving unfair rebates, refunds, or concessions in consideration of exclusive dealings in inter-State or external trade, is guilty of an offence. It is, however, a good defence in a prosecution that the matter or thing alleged to have been done in contravention of this section was not to the detriment of the public, and did not constitute competition which was unfair in the circumstances : section 7 (A). Any person who, in inter-state or external trade improperly or unreasonably refuses to deal with any other persons is guilty of an offence : section 7 (B).

By the amending Act of 1910, the words in section 4 (A) of the principal Act " to the detriment of the public " were omitted and a new section to the following effect was inserted. It shall be a defence to a prosecution for an offence under section 4 (A) of the Act that

the matter or thing alleged to have been done in restraint of or with intent to restrain trade or commerce was not to the detriment of the public and that the restraint of trade or commerce effected or intended was not unreasonable.

This amendment made an important change in the onus of proof in Crown prosecutions. Under the law as it stood before the amendment, the Crown was required to prove "detriment to the public"; under the amendment that onus has been removed from the Crown and the defendant is required to show that any restraint which may be proved is not to the detriment of the public and not unreasonable.

By another section in the same amending Act, the words in section 7 of the principal Act "with intent to control to the detriment of the public" etc., were omitted; thus, to some extent, reducing the burden of proof cast upon the Crown in monopoly prosecutions.

#### SPIRITS (DESCRIPTION) ACT 1906.

No importer or inter-State trader is allowed to describe any spirits as "Pure Australian Standard Brandy" or "Australian Blended Brandy" or "Australian Standard Malt Whisky" or "Australian Blended Whisky" or "Australian Standard Rum," unless the spirits are respectively "Pure Australian Standard Brandy" or "Australian Blended Brandy," "Australian Standard Malt Whisky" or "Australian Blended Whisky" or "Australian Standard Rum" as defined by this Act. No importer or inter-state trader is allowed to describe as brandy any spirit not distilled wholly from grape wine. No imported spirits (other than gin, Geneva, Hollands, schnapps, or liqueurs) can be delivered from the control of the customs for human consumption unless the Collector of Customs for the State is satisfied that the spirits have been matured by storage in wood for a period of not less than two years. If imported spirits are found on analysis to be of bad or inferior quality and unfit for human consumption they may be methylated.

#### SEAMEN'S COMPENSATION ACT 1909.

This Act provided that seamen employed on ships registered in the Commonwealth when engaged in trade with other countries, or on any ship engaged in the coasting trade if they have been shipped under articles of agreement entered into in Australia, and

seamen in the service of the Commonwealth other than the naval or military service, meeting with a personal injury by accident arising out of and in the course of their employment, should be entitled to claim compensation from their employers in accordance with the first schedule of the Act. The first schedule gives a scale and defines the conditions of compensations; the second schedule prescribes the legal procedure to be followed in order to obtain compensation under the Act. The Seamen's Compensation Act 1909 which expressly dealt with all the coasting trade of Australia, whether within the limits of a State or extending from one State to another, was held by the High Court to be beyond the constitutional power of the Federal Parliament and therefore null and void. *The Owners of the S.S. Kalibia v. Wilson*, (1910) 11 C.L.R., 689.

In consequence of the decision of the High Court in the *Kalibia Case* the Seamen's Compensation Act (1911) was passed expressly confined in its operation to those engaged in inter-state and external commerce.

#### § 46. "TRADE AND COMMERCE."

##### **Potency of the Commerce Power.**

The potency, adaptability and spaciousness of the Federal power over inter-state and external trade and commerce is shown in a mass of decisions given in the course of the judicial interpretation of the Federal Constitution, both in the United States and in Australia. It is now established beyond all controversy that this power includes authority to prohibit trusts, combines, and monopolies in the restraint of inter-state and external trade and, to some extent, to regulate the labour and employment conditions of workers operating such trade and commerce.

The commerce power is plenary as to its objects and includes a power to prescribe rules of conduct by which inter-state and external commerce may be promoted and secured. It extends to making laws for the prevention and punishment of all active obstruction to the freedom of inter-state commerce. In *Re Debbs*, 158 U.S., 564, at p. 580; *United States v. Working Men's Amalgamated Council of New Orleans*, 54 Fed. Rep., 994.

Commerce includes the transportation of goods and agents and persons and railways used for inter-state communication. In the United States the commerce power has received the widest, and in

fact, most surprising, interpretation. Among other measures, under this heading, laws have been passed for securing the safety of men employed upon railways engaged in inter-state traffic, for imposing tests of capacity upon engine drivers engaged in that traffic, and for the enforcement of awards as to terms of employment made upon voluntary submission to arbitration by the employers and the men.

### **Anti-Trust Laws.**

The Australian Industries Preservation (Anti-Trust) Act is based on section 51 (1.) of the Constitution, which gives the Federal Parliament power to regulate trade and commerce between the States, and with other countries. That section is identical with, having been copied from, a similar one in the Constitution of the United States. The provisions of the Australian Anti-Trust Act are similar in substance to, but clearer and more effective than, those of the Sherman Anti-Trust Act passed by Congress in 1890 entitled "An Act to protect trade and commerce against unlawful restraints and monopolies." Section I provides :—"Every contract, combination, in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the States, or with foreign countries, is hereby declared to be illegal. Penalty, misdemeanour, fine 5,000 dollars, or one year's imprisonment." Contracts in restraint of inter-state trade were thereby made not only illegal, but criminal. It may be interesting and useful to summarise the course of interpretation and litigation in which the American Act has been tested and its constitutionality has been affirmed. The conclusion is obvious that what has been done by legislation and judicial enforcement in America, without an amendment of the Constitution, can be done in Australia.

### **Coal Combine Cases in the United States.**

One of the first cases decided under the Act was that of *United States v. Jelleco Mountain Coal Company*, (1891) 46 Fed. Rep., 432. The Supreme Court held that an agreement between coal-mining companies in Tennessee operating chiefly in one State and the delivery of the coal to be in another State, creating a coal exchange, fixing the price of coal at the mines, and the margin of profit to the dealers, enforcing the same by fines, was in restraint of trade, contrary to the Act and liable to the penalties of the Act.

In the *United States v. Coal Dealers' Association of California*, (1898) 85 Fed. Rep., 252, an unincorporated association of coal

dealers, regulating the distribution and prices of coal in the interstate coal traffic, was held to be an illegal combination. Similarly in the *United States v. Chesapeake and Ohio Fuel Company*, (1900), 115 Fed. Rep., 610, the Court held that an agreement by a corporation to take the entire product of a number of coal-producing firms engaged in coal mining, intending to sell the same at not less than the price to be fixed by an executive committee, and to account to the parties the entire proceeds above a fixed sum, to be retained as compensation, was held to be contrary to the Act and void.

### **Monopoly of Manufacture.**

In the *United States v. Knight*, (1894) 156 U.S., 1, it was held that the Anti-Trust Act applies only to restraints of trade and commerce between the States, and does not extend to a manufacturing company within a State, acquiring nearly complete control of the manufacture of sugar, as manufacture is not commerce. See, however, the *Tobacco and Pipe cases*.

### **Freight and Traffic Cases.**

The facts in the *United States v. Trans-Missouri Freight Association*, (1897) 166 U.S., 292, were that there was an agreement by members of the railway associations for their mutual protection also that there should be reasonable rates charged by competing carriers on all freight traffic, both through and local. This was held to be an unlawful restraint within the meaning of the Act. It was decided that the prohibitions of the Act applied to any restraint and whether reasonable or unreasonable at common law. A similar judgment was given in the *United States v. Joint Traffic Association*, (1896) 76 Fed. Rep., 895 ; 171 U.S., 244.

### **Pipe and Steel Combine.**

The case of the *United States v. Addyston Pipe and Steel Co.*, (No. 3), 85 Fed. Rep., p. 278, is instructive as showing the operation of the anti-trust law. This was a proceeding in equity begun by petition filed by the Attorney-General on behalf of the United States, against six corporations engaged in the manufacture of cast-iron pipe, charging them with a combination in violation of the Act of 1890. It was shown that the defendant companies entered into a combination to raise the price of pipe for all States, west and south of New York, Pennsylvania and Virginia. Their joint output was two hundred and twenty thousand tons, while the total capacity

of all the other pipe manufacturers was one hundred and seventy thousand five hundred, of which an important part was manufactured at places so far distant from the places of considerable demand that necessary freight rates excluded competition. The mills of the defendants were situated, two in Alabama, two in Tennessee, one in Kentucky, and one in Ohio. Custom required the seller to deliver the pipe at the place where it was to be used by the buyer, and to include in the price the cost of delivery. Under the agreement every request for bids was submitted, except in the case of certain cities which were "reserved" for particular members of the combination, to the central committee, which fixed a price and awarded the contract to the member which would agree to pay for the benefit of the other members of the association, the largest bonus. The contract of association restrained every defendant, except the one selected to receive the contract, from soliciting in good faith, or making, a contract for pipes with the intending purchaser, and restrained the defendant so selected from making a contract except at the price fixed by the committee. The Circuit Court held that the case was not within the Federal jurisdiction.

The case came before the Circuit Court of Appeal, which reversed the judgment of the Circuit Court and granted an injunction. It afterwards came before the Supreme Court of the United States, (1899) 175 U.S., 211.

Mr. Justice PECKHAM, delivering the unanimous judgment of the Supreme Court of the United States, said :—" Under this grant of power to Congress, that body, in our judgment, may enact such legislation as shall declare void and prohibit the performance of any contract between individuals or corporations, where the natural and direct effect of such a contract will be, when carried out, to directly, and not as a mere incident to other and innocent purposes, regulate to any substantial extent, inter-State commerce " ;

" If the necessary, direct and immediate effect of the contract be to violate an act of Congress and also to restrain and regulate inter-state commerce, it is manifestly immaterial whether the design to so regulate was or was not in existence when the contract was entered into. In such a case the design does not constitute the material thing. The fact of a direct and substantial regulation is the important part of the contract, and that regulation existing, it is unimportant that it was not designed."

“Where the contract affects inter-state commerce only incidentally and not directly, the fact that it was not designed or intended to affect such commerce is simply an additional reason for holding the contract valid and not touched by the act of Congress. Otherwise the design prompting the execution of a contract pertaining to and directly affecting, and more or less regulating, inter-state commerce is of no importance. We conclude that the plain language of the grant to Congress of power to regulate commerce among the several States includes power to legislate upon the subject of those contracts in respect to inter-state or foreign commerce which directly affect and regulate that commerce, and we can find no reasonable ground for asserting that the constitutional provision as to the liberty of the individual limits the extent of that power as claimed by the appellants”: 175 U.S., 211, at p. 228.

#### **Northern Securities Case—The Rule of Reason.**

The true principle of the Act was exhaustively considered by the Supreme Court in a great contest known as *Harriman v. Northern Securities Co.*, (1904) 197 U.S., 244, in which it was held that the organization of a New Jersey Corporation, as a holding corporation, for the shares of competing State railroads, was an illegal combination in restraint of inter-state commerce.

In this case Mr. Justice BREWER said that the contracts in the two preceding cases were unreasonable, and the convictions were rightly sustained. In his opinion, a true test was whether the restraint was reasonable or unreasonable at common law. Congress, he said, did not intend to reach minor contracts in partial restraint. This construction was adopted by the Supreme Court as the rule of reason in the *Standard Oil* and *Tobacco Cases*, decided in 1911. It was held that the Act only forbade restraints which operated to the prejudice of the public interest by unduly restricting competition, or the due course of trade. In the *Standard Oil* and *Tobacco Cases*, the Court found on the evidence that there was a direct combination for the purpose of crushing competition and monopolising the market. It was thought by some critics that this construction of the Act, recognizing the rule of reason, and admitting judicial discretion, amounted to an emasculation of the Act, but leading jurists consider this criticism as clearly unfounded.

**Chicago Meat Trust Case.**

In the *United States v. Swift*, (1903) 122 Fed. Rep., 529, defendants controlled 60 per cent. of the beef trade of the United States. They bought live stock from different parts of the country, converted into fresh meats; then shipping their meats to their agents, to be sold to consumers in the different States. The purchases, shipments, and transportation were commercially independent; the purchasing agents of the defendants were required to refrain from bidding against each other. At times bidding up was allowed in order to induce large shipments. There was an agreement upon price to be adopted, and restrictions upon the quantities of meat to be shipped; there were arrangements for rebates and discriminating rates. This was held to be an unlawful combination in restraint of trade; an injunction was granted.

**Tobacco Cases.**

In the *United States v. American Tobacco Co.*, (1910-11) 221 U.S., 106, it was proved that the defendants acquired dominion and control over the tobacco trade of the United States by principal and subsidiary associations, as the result of purchasing numerous competitors, in many cases closing up the business when acquired, and obtaining stock control of other competitors, as well as of concerns manufacturing the elements essential to the production of tobacco; held by the Court that the facts constituted a violation of the Anti-Trust Act, that there was an unlawful combination in restraint of trade, and an attempted monopolisation of the tobacco business. A decree was made ordering a plan whereby the trust was dissolved, and the assets of the trust were distributed *pro rata* among the shareholders organized and for new companies. A similar *pro rata* distribution of assets of a combine, adjudged to be illegal, was approved by the Supreme Court in the case of the *Harriman v. Northern Securities Company*, (1904) 197 U.S., 244.

**Standard Oil Case.**

In the *Standard Oil Co v. United States*, (1911) 221 U.S., 1, it was held that the unification and control over the oil industry, which resulted from combining in the hands of a holding company the capital stock of various corporations trading in petroleum, raised the presumption of intent to exclude others from the trade, thus centralising in the combination the perpetual control of the business. This was held by the Court without dissent. A decree of dissolution



was granted, also an injunction enjoining the subsidiary corporations and stock holders from entering into any agreement to bring about any further violation of the Act.

The whole of these decisions would, it is submitted, be applicable to the enforcement of the anti-trust law of the Commonwealth.

### **Labour Obstruction to Commerce.**

The anti-trust and anti-combine provisions of the Sherman Act have been held to apply to all combinations to drive competitors out of the field of inter-state commerce by annoyance, intimidation or otherwise. The means by which a restraint may be effected—whether by contract, by violence, or intimidation—is immaterial. All restrictions upon inter-state and foreign commerce are prohibited : *Prentice and Egan, Commerce Clause of the Federal Constitution*, p. 323.

The Act was first applied to labour troubles in the case of the *United States v. Working Men's Council*, 54 Fed. Rep., 994. In this case a dispute which had arisen between warehousemen at New Orleans and their employees had resulted in concerted action by a large number of labour associations in the city to prevent the employment of non-union men. To effect this compulsion the associations enforced a discontinuance of labour in all kinds of business in New Orleans, including the transportation of goods and merchandise from State to State and to and from foreign countries. In some branches of business the effort was made to replace the striking men by other workmen, but this was resisted by the intimidation springing from large crowds of union men assembling in the streets, and in some instances by violence, so that transportation was effectually stopped.

The Court conceded that at the outset of the contest, the labour organizations acted lawfully, but when lawful forces are put into unlawful channels, i.e. when lawful associations adopt and further unlawful purposes and do unlawful acts, the associations themselves become unlawful. The evil, as well as the unlawfulness, of the act of the defendants, consists in this : that, until certain demands of theirs were complied with they endeavoured to prevent, and did prevent, everybody from moving the commerce of the country.

The Act was next applied in the case of the *United States v. Elliott and Others*, 62 Fed. Rep., 801. The defendants were charged

with having combined to prevent railroads radiating from St. Louis from conducting their customary business of transportation between points in Missouri and other States ; that they induced persons employed by the railway companies to leave the service ; that they had issued orders directing members of their organization to cease operating trains of the companies in whose service they were employed and that they had asserted a purpose to prevent any operation by the railways which refused to accede to certain demands. Such a combination, the Court said, was within the fair intent of the Act of 1890. An organization whose object is to prevent the operation of important railroads until they have acceded to certain demands made upon them, whether these demands are in themselves reasonable or unreasonable, just or unjust, is an unlawful conspiracy in restraint of inter-state commerce. A preliminary injunction was therefore granted under the statute, to restrain further violation of the law by the defendants. Upon argument of a demurrer to the bill, the case was again considered and the former decision affirmed. The statute, it was said, declares every act of combination in restraint of trade or commerce among the States, or with foreign nations, illegal, and this prohibition includes any restriction or hindrance created by application of external force. The fact that the bill charged the commission of acts which when done would be crimes does not limit the jurisdiction granted to the Courts. The law would be very imperfect if a number of irresponsible men could conspire to destroy property and interrupt commerce, and nevertheless be beyond the reach of the only order by which the courts could give adequate protection.

The same rule was followed in the *United States v. Debs*, 64 Fed. Rep., 724. Judge Woods in enforcing an injunction restraining the defendant from interfering with inter-state traffic, said :—  
“ The Anti-Trust Act could not apply to one class of monopolies alone. Suppose, for example, some manufacturers of sleeping cars, competing with the Pullman Company, should in their own interests, combine with railroad employees to prevent the use of Pullman cars, . . . would it not be evident that the combination would, in any view of the statute, be within its terms ? But if the officers or agents of car companies, who might or might not be capitalists, are indictable for such offence, how could their fellow conspirators be exempt ? Can workingmen acting by themselves, upon their own motion, and for their own purpose, whether avowed or secret,

do things forbidden by the statute, without criminal responsibility, and yet be criminally responsible for the same things done at the instance of others, and to promote purposes not their own ? or will it be said that under this statute one who is not a capitalist may, without criminality, assist capitalists in the doing of things which on their part are criminal."

The law condemns combinations, not only when they take the form of trusts, but in whatever form they may be found, if they restrain trade. In this case the defendants were adjudged guilty of contempt of Court in violating an injunction, and this order was approved by the Supreme Court upon application for a writ of *habeas corpus* but without basing its decision on the statute: *In re Debs*, 158 U.S., 564.

#### Anti-Combine Law in Australia.

The constitutionality of Commonwealth contract restrictive legislation, as represented by the Australian Industries Preservation Act was considered by the High Court in the case of *Huddart Parker & Co. Ltd. v. Moorehead* and *Appleton v. Moorehead*, (1909) 8 C.L.R., 330. These appeals were brought from convictions for breaches of section 15 (b) of the Act of 1906 in refusing to answer certain questions put to the appellants by the Comptroller-General of Customs. *Huddart Parker & Co.* was a corporation duly formed under the law of the State of Victoria. *Appleton* was the manager of the Company. On behalf of *Huddart Parker & Co.* it was contended sections 5 and 8 relating to foreign and State formed corporations, were *ultra vires*. Both appellants urged that section 15 (b) "power to put questions to any person" was *ultra vires*. The Full Court (*per* GRIFFITH, C.J., and BARTON, O'CONNOR, ISAACS and HIGGINS, JJ.) held that section 15 (b) was within the legislative competence of the Commonwealth Parliament. *Appleton's* appeal was dismissed and he was required to answer the questions. The Full Court, ISAACS, J. dissenting, held that sections 5 and 8, relating to State formed corporations, such as *Huddart Parker & Co. Ltd.*, were *ultra vires* of the Commonwealth Parliament and void because they were not limited to "trade and commerce with other countries and among the States" but purported to regulate the operations and conduct of corporations engaged in trade and commerce within a State. The conviction against the Company was quashed. See notes to section 51 (xx.).

The High Court, first in its original jurisdiction before Mr. Justice ISAACS, in the case of *The King and the Attorney-General of the Commonwealth v. The Associated Northern Collieries*, (1911) 14 C.L.R., 387, and afterwards in its appellate jurisdiction before the Full Court in the same case *sub. nomine the Adelaide Steamship Co. v. The King and the Attorney-General of the Commonwealth*, (1912) 15 C.L.R., 65, had the opportunity of considering and adjudicating upon the constitutionality and scope of some of the provisions of the Australian Industries Preservation Act.

In this case the meaning and effect of some of these sections came before the High Court for consideration under the following circumstances. Shortly after the Act came into operation a complete express contract was entered into between the collieries' owners of the first part, and the ship-owners of the second part, in relation to inter-state trade and commerce in Newcastle and Maitland coal. This contract was renewed and it continued to exist and operate with some intermediate modifications down to the commencement of this action, and it was then still in force. It was entered into and at all events was renewed, as was alleged by the prosecution, with intent to restrain that trade and commerce to the detriment of the public. In other words the contract itself was relied on as constituting an offence against section 4. Next, it is said that there existed during the period mentioned a combination between the two sets of proprietors—coal and shipping—created by the conduct of the parties; that conduct of the parties consisting of concerted business action carried on upon certain recognized lines laid down probably by some contract in the nature of that already referred to, or, if not, then by understanding or practice of a similar tendency and effect and that during the greater part of that period two other shipping firms, the Melbourne Steamship Co. and James Paterson & Co., not defendants, were added to the combination. This combination, it was averred, was maintained with the like intent to restrain the inter-state trade and commerce in Newcastle and Maitland coal to the detriment of the public. The defendants concerned were said to come within the ambit of section 4 as to combinations in three different ways—inasmuch as each of them was, and continued to be, and was engaged in the combination. Next, it was charged that the business conduct of the defendants and their established relations with each other amounted to monopolizing or attempting to monopolize, and to a combination and conspiracy to

monopolize the trade and commerce in Newcastle and Maitland coal, with intent to control, to the detriment of the public, the supply and price of the coal. Lastly as to those who might be considered as merely assisting others to effect the prohibited acts, it was charged that they come within the provisions of section 9 as aiding, abetting, counselling or procuring, and are therefore to be deemed to have committed the principal offences. The detriment to the public which was alleged to have arisen and to have been intended, as a result of the matters complained of, consisted in the practical and persistent annihilation of competition on land and sea, excessive, arbitrary and capricious prices charged to consumers, restriction of their opportunities of choice, difficulties in obtaining particular classes or grades of coal desired, substitution really compulsory of other coal for coal preferred, and delays in obtaining delivery. The defence was in effect a denial of all that was charged by the plaintiffs.

The trial before Mr. Justice ISAACS lasted 73 days. His findings in a powerful and brilliant judgment were as follows:—Held first that the defendants had made and entered into a contract and were and continued to be members of and were engaged in a combination with intent to restrain the inter-state trade and commerce in Newcastle coal to the detriment of the public and that they had also monopolized and combined or conspired to monopolize the said trade with intent to restrain to the detriment of the public the supply and price of the said commodity within the provisions of sections 4 and 7 of the Act and that the defendants had aided and abetted one another under section 9 in the commission of the said offences and penalties inflicted on the individual defendants and an injunction granted against the further carrying out of the unlawful contract or combination.

Upon appeal to the High Court in August 1912, the judgment of Mr. Justice ISAACS was reversed on the following ground:—“ That the agreement between the proprietors and the ship-owners was not, on its face, made with intent to restrain trade or commerce to the detriment of the public or with intent to monopolize the inter-State trade in such coal to the like detriment. (2) That an intention to cause detriment to the public should not be inferred from the mere fact that the powers conferred by the agreement could be used so as to cause such detriment. (3) That on the evidence, that no actual detriment to the public was shown to have

been caused by the exercise of the powers conferred by the agreement and, therefore, that no intent to cause such detriment could be inferred : *Adelaide Steamship Co. Ltd. v. The King and the Attorney-General of the Commonwealth*, (1912) 15 C.L.R., 65. On appeal to the Privy Council the decision of the High Court was affirmed : (1913) 18 C.L.R., 30.

### **Employers' Liability Legislation in United States.**

Congress has passed several Employers' Liability Acts for the benefit and protection of persons engaged in inter-state traffic and transportation including goods and passengers. The validity of the first of these Acts was considered by the Supreme Court in the case of *Howard v. Illinois Central Railroad Co.* (1907) (*Employers' Liability Case* (No. 1), 207 U.S., 463. The Act of 1906 provided that inter-state carriers should be liable to the personal representatives of an employee who has died from injuries resulting from the negligence of the employers or their servants, or from negligence in the condition of their plant or work. It altered the law as to contributory negligence in respect of liability ; it directed how the jury should deal with damages, and for whose benefit whether the widow, children, parents or next of kin of the deceased ; it prevented contracting out, etc. All these were, strictly matters covered by the police powers of the States, at all events until Congress otherwise legislated. The Act was declared invalid by five Judges to four, but only on the ground that in its terms these provisions extended to purely intra-state commerce. On the question of constitutional power, six Judges held that all the provisions were fully within the competency of Congress if limited to inter-state commerce. So limited it extends to prescribing rules of conduct as to anything directly tending to promote the efficiency or safety of the operations of commerce and laws abrogating the defence of common employment and the defence generally expressed by the maxim *volenti non fit injuria* are within the power.

The argument that the Federal Act inordinately extended the power of Congress and unduly diminished the legislative authority of the States, since it sought to exert the power of Congress as to the relation of master and servant, a subject hitherto treated as being exclusively within the control of the States, and that in practice its execution would cripple the States and enlarge the Federal power, was dismissed by the Supreme Court of the United States from its consideration as concerning merely the expediency of the

Act and in the power of Congress to pass it. The Supreme Court held that Congress could regulate inter-state commerce and therefore it could regulate a train moving in that commerce; that then it could regulate the relations of the master and his servants operating the train, and the relations of the servants between themselves. To refuse to extend the power to these contractual relations would, as the Court said "be to concede the power and then to deny it, or, at all events, to recognize the power and yet to render it incomplete": Cited by Mr. Justice ISAACS, 6 C.L.R., at p. 103.

Mr. Justice MOODY who dissented on the minor question of construction of the Act, was in accord with the majority on the point of power. He dismissed as futile the objection of novelty in the character of legislation, describing it as an argument that misunderstands the nature of the Constitution, undervalues its usefulness, and forgets that its unchanging provisions are adaptable to the infinite variety of the changing conditions of the national life. He traced the gradual steps of Congress to deal with national problems as they arose, and instanced postal legislation, commerce legislation, the safety appliance law, and the Act limiting the hours of service of employees engaged in inter-state commerce—an Act which the defendants would, of course contend was *ultra vires*: Cited by Mr. Justice ISAACS, 6 C.L.R., at pp. 103-4.

The Employers. Liability Act 1908, as amended by the Act of 1910 has been held by the Supreme Court to be constitutional; that Congress may in the execution of its power over inter-state commerce regulate the relations of common carriers and their employees whilst they are engaged in such commerce; that such commerce which includes transportation is an act done by the labour of men and the help of things; that men and things are the agents and instruments of commerce; that Congress may lawfully legislate with respect to such agents and instruments and the conditions under which they perform the work of inter-state commerce that such legislation can promote the reliability, promptness, economy or security or utility of the inter-state commerce Act.

In *Mondou v. New York Railroad Co. (Employers' Liability Case, No. 2)*, 223 U.S., at p. 49, the Supreme Court sustained a Federal Act enforcing the liability of employers for accidents to their employees whilst both were engaged in inter-state commerce, such accidents arising from the negligence of the employers. The

Court held that the power over inter-state commerce (expressed in the United States Constitution in practically the same terms as in that of the Commonwealth) authorized Congress to regulate the relation of inter-state common carriers by land and their employees, while both were in the act of commerce, subject to the Constitution, and to the following important qualification: "that the particulars in which those relations are regulated must have a real or substantial connection with the inter-state commerce in which the carriers and their employers are engaged": 223 U.S., 1, at pp. 48-49. Congress, it was held, can do anything which, in the exercise by itself of a fair discretion, may be deemed appropriate to save the act of inter-state commerce from prevention or interruption, or to make that act more secure, more reliable or more efficient.

The argument adopted by the Court went on to point out that the men and the things used in the act or operation of inter-state commerce were the agents or instruments of that commerce, and that their destruction during the act would stop or their interruption would interrupt that commerce. If they were not of the right kind or quality, inefficiency of some kind would ensue; and wrong or disadvantageous conditions of working would prevent or interrupt the act of commerce, or diminish its expedition, reliability, economy, or security. "Therefore," it was said "Congress may legislate about the agents and instruments of inter-state commerce and about the conditions under which those agents and instruments perform the work of inter-state commerce whenever such legislation bears or in the exercise of a fair legislative discretion can be deemed to bear upon the reliability or promptness or economy or security or utility of the inter-state commerce act": 223 U.S., 1, at p. 48. Two propositions laid down by the Court which were said to be "no longer open to doubt" were as follows:—

(3) "To regulate inter-state trade and commerce is to foster, protect, control and restrain with appropriate regard for the welfare of those who are immediately concerned and of the public at large."

(6) "The duties of common carriers in respect of the safety of their employees, while both are engaged in commerce among the States, and the liability of the former for injuries sustained by the latter while both are so engaged, have a real or substantial relation to such commerce and therefore are within the range of this power." The Court was there speaking of their injuries for which the Statute



offered a remedy, namely, those sustained by reason of the negligence of the employer in his transactions of trade, that is, by reason of some of the faults which, if unchecked would affect commerce by rendering it less expeditious, less reliable, less economical and less secure. 223 U.S., 1, at pp. 47, 48.

### **Safety Appliance Legislation.**

The American Safety Appliance Act passed by Congress in the year 1908 made regulations relating to the equipment of locomotives and other vehicles used in moving inter-state commerce and including those which were incidentally used in moving intra-state traffic. The constitutionality of this legislation was affirmed by the Supreme Court in the *Southern Railway Company v. United States*, 222 U.S. Rep., p. 20.

In delivering the judgment of the Supreme Court, Mr. Justice VANDEVANTER discussed the question whether the Statutes impeached were within the commerce power, "considering that they are not confined to vehicles used in moving inter-state traffic but embrace vehicles used in moving intra-state traffic." The answer to that question, he said, depended on this other one: "Is there a real or substantial relation or connection between what is required by these acts in respect of vehicles used in moving intra-state traffic and the objects which the acts obviously are designed to attain, namely, the safety of inter-state commerce and of those who are employed in its movement?" Stating the question in an alternative form he answered it in both forms affirmatively and it was held that the Statutes were within the commerce power. The Act was held to be valid. The power of Congress, extends to protect persons and property moving in such commerce from all danger, whatever the source. To that end, Congress may require all vehicles moving on highways of inter-state commerce to be so equipped as to avoid danger to such persons. A disaster to one train is apt to impede the progress and imperil the safety of others: *Southern Railway Co. v. United States*, (1911) 222 U.S., 20.

### **Contracting out forbidden.**

Congress has power to impose liability on an employer under the *Employers Liability Act* 1908 for injuries to employees. When Congress can impose such a liability, it can also ensure its efficacy

by forbidding any contract, rule, regulation, or device, in evasion of liability. *Philadelphia &c. Railway Co. v. Schubert*, (1912) 224 U.S., 603.

### **Employers' Liability in Australia.**

The employers' liability laws applied to trade and commerce are, in substance, laws imposing on employers the absolute obligation to be answerable for negligence of their employees, thereby giving them, the employers, an active interest in and motive for preventing such negligence. This, it has been explained, has the effect of imposing a rule of conduct on the employers themselves by identifying them with their workmen and agents. But Congress has never attempted to legislate with respect to any matter not directly concerning rules of conduct in inter-state traffic. Doubt, has been expressed as to whether the true and proper test of the constitutionality of such legislation is, whether it promotes the efficiency or safety of commercial operations. *Per GRIFFITH, C.J. in the Australian Steamship Co. Ltd. v. Malcolm*, (1914) 19 C.L.R., at p. 306.

The applicability of American decisions in the interpretation of Commonwealth powers and the validity of the Commonwealth Seamen's Compensation Act (1911) was expressly raised and settled in *The Australian Steamships Co. Ltd. v. Malcolm*, (1914) 19 C.L.R., 298.

The ship *Burwah* owned by the Australian Steamship Co., left Sydney on an inter-state voyage on 7th May 1913. The second mate, W. Malcolm, lost his life at sea on that date by an accident arising, it was conceded, out of and in the course of his employment. His widow brought an action in the District Court, Sydney, against his employers (the appellants) for compensation under the terms of the Seamen's Compensation Act 1911 (No. 13 of 1911), a statute of the Commonwealth; the second mate being a seaman within the definition expressed in the statute.

From the evidence it appeared that William Malcolm fell overboard from the *Burwah* at a spot which is outside the territorial limits of the Commonwealth and was drowned. The only material defence was that the Seamen's Compensation Act 1911 was invalid, as not being within the powers conferred upon the Federal Parliament under the Commonwealth of Australia Constitution Act. The District Court Judge having given judgment for the plaintiff for £500 the defendants appealed to the High Court on the ground of the invalidity of the Seamen's Compensation Act 1911.

It was held by the majority of the High Court, ISAACS, GAVAN DUFFY, POWERS and RICH, JJ. (GRIFFITH, C.J. and BARTON, J., dissenting) that the Seamen's Compensation Act 1911 was a valid exercise of the legislative power of the Parliament; that sections 51 (1.) and 98 of the Constitution conferred upon the Commonwealth Parliament power to legislate as to navigation and shipping so far as concerns foreign and inter-state traffic and in particular to regulate the reciprocal rights and obligations of those engaged in carrying on that traffic by means of ships.

For the appellants it was argued that the only power under which it could be contended that it was valid was the trade and commerce power in section 51 (1.) of the Constitution. One of the limits of that power was laid down in *The Federated Amalgamated Government Railway and Tramway Service Association v. New South Wales Railway Traffic Employees' Association*, 4 C.L.R., 488, at p. 545, namely, that it does not extend to matters the effect of which upon inter-state trade and commerce is not "direct, substantial and proximate." The provision in section 98 of the Constitution that the trade and commerce power extended to navigation and shipping, it was urged, does not enlarge the power. The Seamen's Compensation Act had no effect, "direct, substantial or proximate," upon trade and commerce, or upon navigation and shipping. It was not a shipping law but a social law.

In support of the Federal Act it was contended that section 98 of the Constitution conferred on the Commonwealth Parliament power to enact any provision which could properly come within a Commonwealth Act as to merchant shipping, that is, properly having regard to the history of legislation as to merchant shipping. A peculiar characteristic of a merchant shipping act, it was pointed out, is the taking effective care of seamen during their lives and making provisions obligatory on owners after the death of seamen as well as during their lives. Provisions similar to any that occurred in English law as to merchant shipping, at the time the Constitution came into existence, might, it was argued, be enacted by the Commonwealth Parliament under the navigation and shipping power.

The safety of employees had a real relation to the subject-matter of navigation and shipping and therefore came within the ambit of that power. The Act was also within the trade and commerce power. Under that power Parliament has authority to impose

obligations upon common carriers of inter-state goods. It might impose obligations on owners of ships as to goods or passengers carried or as to the men by whom the ships are worked. The Act imposed upon owners of ships in respect of seamen no greater liability than was imposed upon common carriers in respect of goods. In support of these contentions reliance was placed on the decisions of the Supreme Court of the United States in the *Employers' Liability Cases*.

Referring to the American cases on employers' liability, the Chief Justice (Sir SAMUEL GRIFFITH) said :—" These laws are in substance laws imposing upon employers an absolute obligation to be answerable for and therefore to prevent, negligence on the part of all their employees. This is, in one sense, to impose a rule of conduct upon employers themselves by identifying them with their agents. But Congress has never attempted to legislate as to any matter not directly concerning rules of conduct, and the American Courts have consequently never been asked to pronounce upon the question whether the power extends beyond prescribing such rules " : (1914) 19 C.L.R., at p. 306.

" But before leaving these decisions I may be permitted to observe that the test of promoting the efficiency or safety of the operations of commerce is an unsatisfactory one. It may be that the object avowed or unavowed of the Legislature is not to encourage but to discourage any particular branch of commerce and that for this purpose they impose rules of conduct which if observed will render the operations less efficient and less safe than they would otherwise be. I cannot think that this would in any way affect the validity of the legislation. This was pointed out by the Judicial Committee in the case of *Grand Trunk Railway of Canada v. Attorney-General of Canada*, (1907) A.C., 65." *Per* GRIFFITH, C.J. in *The Australian S.S. Co. Ltd. v. Malcolm*, (1914) 19 C.L.R., at p. 306.

Mr. Justice BARTON, referring to the *Mondou Case*, *supra*, p. 288, said :—" It will be a question whether the Seamen's Compensation Act purports primarily, as it is argued that it purports, to check any fault of such a tendency or whether it deals merely with 'a mere incident of commercial intercourse,' as a means to social reform, or to any other and not authorized but apparent on its face." " The *Southern Railroad Case*," he said, " is very explicit in requiring

a real and substantial relation between the thing required or prohibited and the regulation of inter-state commerce and of the actions of persons engaged therein, as a true test of the validity of the legislation." *Per* BARTON, J. in the *Australian S.S. Co. Ltd. v. Malcolm*, 19 C.L.R., at p. 318-19.

Mr. Justice ISAACS said :—" By ' real or substantial relation to such commerce ' I understand such a relation as really or substantially affects the commerce itself, and so that if the matter in question were not susceptible of control the commerce itself would, to that extent, be left uncontrollable. It is evident to me that to leave outside the sphere of control with respect to inter-state and foreign trade and commerce all but the mere act of supply of commodity or service would practically nullify the power. Limiting my observations to present purposes, the class of vehicles to be employed, the appliances necessary for safety, the classes of individuals to be employed either in relation to race, language, age or sex and perhaps to some extent the contractual rights and obligations of the carrier and the public, would all be outside the power. If not, then it is not easy to see why any modification of common law or Statute law affecting the relations of employer and employee while engaged in co-operating in the trade and commerce so as to conduce really or substantially to affect the service rendered to passengers or to shippers, is not part of the necessary control of the subject. If, for instance, a physical bar habitually stood on a ship between the sailors and the passengers so as to prevent timely aid in a moment of danger no one would dispute the right of the Commonwealth Parliament to require its removal. And if the State law—whether common law or Statute law—so restricted a sailor's right to compensation in case of accident, as to morally but most effectually act upon human nature by deterring him from rendering prompt and ready aid, it would, as I conceive be no less an obstacle to the desired conduct of the trade and commerce placed under Federal control. And if a physical obstacle can be removed, an incorporeal obstacle operating at times, even more effectually on human nature, may also be removed, and facilities may, with equal authority, be created. . . . Of course since the cases sustain concrete legislation which makes negligence the ground of liability it could not be disputed that so much was within the power of Congress. But I can find no statement of principle that negligence is the limit of legislative power. The inference I would draw from such cases

as *Seaboard Air Line v. Horton*, 233 U.S., 492 and *Illinois Central Railroad Co. v. Behrens*, 223 U.S., 473, is to the contrary. The power of the Commonwealth Parliament is to regulate a subject and negligence is not that subject. Navigation and shipping in relation to inter-state and foreign commerce is part of the subject. If so, it is impossible to exclude the authority to legislate for compensation merely because it is irrespective of negligence. For negligence full damages are recoverable. For accidental injury the damages are limited—that is, the loss is shared. Whether this is prudential or advisable is a matter of parliamentary discretion but the root of the matter is now an accepted economic position, and is this: the relations of employers and employees and the actual conduct of inter-state and foreign commerce are the relations of essential connected and closely related parts of the same mechanism." *Per ISAACS, J.* in the *Australian Steamships Co. Ltd. v. Malcolm*, (1914) 19 C.L.R., at pp. 331-333. The validity of the Seamen's Compensation Act 1911 was sustained by a majority of the High Court.

### Hours of Labour.

An Act of Congress limiting the working hours of workmen employed by the United States, or by contractors on public works of the United States, is constitutional: that the motive, or purpose, may be to secure control over conditions of labour, does not make it unconstitutional: *Ellis v. United States*, (1907) 206 U.S., 246.

An Act of Congress of 1907, regulating the hours of labour of employees engaged in inter-state commerce is not invalid because it applies to employees who are also engaged in intra-state commerce (*Employers' Liability Cases*, (No. 1), 207 U.S., 463, distinguished). The power to regulate the agencies of inter-state commerce is not defeated by the fact that the agencies regulated are also connected with intra-state commerce: *Baltimore and Ohio Railway v. Inter-State Commerce Commission*, (1911) 221 U.S., 612. And see *Northern Pacific Railway Co. v. Washington*, (1912) 222 U.S., 370.

### Membership of Trade Unions.

The provision of an Act of Congress, forbidding inter-state carriers to discriminate against an employee because of his membership of a labour organization, was held to be unconstitutional. There is no sufficient connection between membership of an organization and the regulation of commerce. The commerce power cannot

be exercised in violation of the Constitution: *Adair v. United States*, (1908) 208 U.S., 161. This decision, however, appears to depend largely on the rights of property and liberty guaranteed by the American Constitution.

### Regulation of Wages.

Great as the commerce power has proved to be, it is nevertheless conceded that the general words must of necessity be subject to some limitation, not as to the manner in which it may be exercised but as to the legitimate objects of the power. Even in the United States, whilst regulating the hours of labour, Congress has not, up to the present, undertaken to regulate by law the wages and terms of employment of men so engaged. There can be no doubt that if the plenary power of Congress or of the Commonwealth Parliament extends to such regulation they may exercise that power through tribunals or special authorities set up for the purpose, but the right to set up such tribunals or authorities does not extend beyond the power authorized to be delegated to them.

In the *Federated Amalgamated Railway Employees' Case*, (1906) 4 C.L.R., 488, the Chief Justice (Sir SAMUEL GRIFFITH), delivering the judgment of the Court said :—

“ As at present advised we are of opinion that the legislative authority of the Commonwealth Parliament under the commerce power in question, so far as regards wages and terms of engagement, does not extend further—if it extends so far, as to which we reserve our opinion—than to prohibit for causes affecting inter-state traffic specific persons from being employed in such traffic. It cannot, as already said, be disputed that the plenary powers of State Legislatures with respect to matters within their competence extend to everything done within the State which may, directly or indirectly, affect trade and commerce.

“ But we think that the power of the Commonwealth Parliament to regulate inter-state trade and commerce, although unlimited within its ambit, cannot as a mere matter of construction, be held to have so wide an ambit as to embrace matters, the effect of which upon that commerce is not direct, substantial and proximate. And, in our opinion, the general conditions of employment are not of this character. We arrive at this conclusion upon the mere language of section 51 (I.). But it is much fortified by the language of (xxxii.), which expressly empowers the Commonwealth Parliament to make laws for the control of State railways with respect to transport for the naval and military purposes of the Commonwealth. Having regard to the rules of construction, we think it is hard to reconcile the conferring of this express power with the

implied existence under section 51 (1.) of a power which would undoubtedly, if the larger construction contended for is adopted, not only include that conferred by (1.), but go far beyond it.

“The word ‘control’ as used in (xxxii.) cannot, we think, be limited to manual or physical control. It is the widest possible term, and is at least co-extensive with the asserted general power to ‘regulate.’”

“Assuming, however, that the power in question does extend to the regulation by law of the terms of employment upon State railways, it is clear that it extends to them only so far as regards inter-state traffic and only as far as regards men engaged in that traffic. And this consideration affords a fatal objection to the validity of the provision now in question, so far as it depends for support on the trade and commerce power.” *Per GRIFFITH, C.J. in The Federated Amalgamated Government Railway and Tramway Service Association v. The New South Wales Railway Traffic Employees’ Association*, 4 C.L.R., at p. 545.

#### General Conditions of Employment.

In the *Federated Amalgamated Railway Case*, (1906) 4 C.L.R., at p. 545, decided in 1906, before the *American Employers’ Liability Cases* (1907) were decided, the High Court of Australia laid down a proposition that the trade and commerce power could not, as a matter of construction, be held to have so wide an ambit as to embrace matters the effect of which upon trade and commerce is not “direct substantial and proximate” and that general conditions of employment are not of this character. This proposition was reviewed in the *Australian Seamen’s Compensation Case*, (1914) 19 C.L.R., at p. 306, in which GRIFFITH, C.J. said:—“The phrase ‘general conditions of employment’ must be read with regard to the matter then under discussion and is limited to matters not directly relating to the conduct of the operation of commerce. With this qualification I adhere to the rule laid down in the *Railway Servants’ Case*.”

In the *Seamen’s Compensation Case* the majority of the High Court, ISAACS, GAVAN DUFFY, RICH AND POWERS, JJ. did not consider it necessary to dissent from this limited view of the commerce power, as the validity of the Act was sustained by section 98 of the Constitution, but ISAACS and POWERS, JJ. cited with approval the views enunciated by the Supreme Court of the United States in the *Employers’ Liability Cases*.

#### Importation.

In the exercise of its power to make laws in respect of trade and commerce with other countries, the Federal Parliament has



authority to regulate, and even prohibit, the importation of goods into the Commonwealth. On this ground a claim made by the Government of New South Wales to import steel rails for the State railways without paying duty was negatived in *Attorney-General of New South Wales v. Collector of Customs*, 5 C.L.R., 818.

The Customs Act 1901, section 52 (g) empowers the Governor-General to prohibit by proclamation, either absolutely or conditionally, the importation of any goods specified in the proclamation; held to be a valid exercise of legislative power with respect to trade and commerce with other countries: *Baxter v. Ah Way*, 8 C.L.R., 626.

### **Exportation.**

The Customs Act 1901-1910, Part VI., contains provisions enabling the Governor-General, by proclamation to prohibit, either absolutely or conditionally, the exportation of certain kinds of goods specified in the Act. The Commerce (Trade Descriptions) Act 1905, sections 11 to 15, enables regulations to be made prohibiting the exportation of certain specified kinds of goods unless there is applied to them a trade description of such character, relating to such matters, and applied in such manner, as is prescribed. In *Woodstock Central Dairy Co. Ltd. v. The Commonwealth*, (1912) 15 C.L.R., 241, certain regulations for the grading of butter for export were held to be *ultra vires* of the Act, on the ground that the prescribed grade-marks were not trade descriptions within the meaning of the Act, but no doubt was thrown on the constitutional power of the Commonwealth Parliament in that respect. If the Legislature intended to require the application of such grade-marks to exported goods it was easy to supply the want by amendment. It has the power, if it thinks fit to exercise it, to establish a standard of trade on any basis it may choose, to be arrived at and applied in any method it may think fit, and may prohibit export of any goods not graded or marked in the manner prescribed.

### **Maritime Contracts.**

In the case of *Dimond v. William Collins & Sons Ltd.*, (1912) Q.W.N., 1; it was held by the District Court, Brisbane, that a clause in a shipping receipt providing that "No claim for cargo lost, damaged, or destroyed is recoverable, unless made in writing at port of destination within seven days from the date such cargo was or should have been landed," is a clause whereby the obligations

of the master, officers, agents, and servants of the ship to care for, preserve, and properly deliver goods entrusted to them as carriers are lessened, weakened, and may be avoided within the meaning of section 5 (c) of the Sea Carriage of Goods Act, and that the clause is therefore illegal, and of no effect.

### Trade Description and Grading.

In the case of the *Woodstock Central Dairy Co. Ltd. v. The Commonwealth* (1912) 15 C.L.R., 241, the High Court considered the meaning and effect of the Commerce Act 1905. It was held that the Act does not confer any power upon an officer of customs to grade goods submitted to him for export and that therefore certain regulations, in so far as they purported to confer this power, were *ultra vires* the Act.

The plaintiff company was a manufacturer and exporter of butter. The defendants claimed to be entitled, under regulations 34, 35, 38 and 40 of 29th November 1910, made under the provisions of the Commerce Act 1905, to grade and place marks indicating such grade upon the boxes of butter submitted by the plaintiff to the defendants for examination for export. The plaintiff charged that such grading and working would have a prejudicial effect upon the sale of its butter. It was admitted that the said regulations, if *intra vires*, gave the defendants power to grade the butter, but the plaintiff contended that the regulations were *ultra vires* the said Act, and the question submitted for the determination of the Court was whether this contention was correct. Power to make regulations is conferred by section 17 of the Act.

The Court (*per* BARTON, O'CONNOR and ISAACS, JJ.) held that the defendants were not entitled under the Act, and such of the regulations as are valid, to grade the butter of the plaintiff company, or to place on the boxes containing the butter, marks indicating any grade other than that to which such butter belonged at the time when it was submitted by the plaintiff company to the defendants through their officers for inspection and examination.

### Trade Marks.

The power to make laws in respect of trade and commerce with other countries and amongst the States involves the right of legislating in respect of marks used in that trade and commerce. But the Parliament could validly exercise that power only by an

enactment which confined its operations within those limits. The decision of the Supreme Court of the United States in the *Trade Mark Cases*, 100 U.S., 82, is exactly in point. The United States Constitution conferred on Congress no special power of legislation in respect of trade marks. But that body, assuming to have the power under the authority which the Constitution has conferred on it of making laws relating to copyrights, passed an Act purporting to regulate trade marks generally. The Court held, assuming that the commerce power included the power to regulate trade marks used in the commerce under the control of Congress that it could not be exercised except by the Statute which on the face of it confined within those limits the general expressions used in its provisions. Mr. Justice MILLER in delivering the judgment of the Court, 100 U.S., 82, at p. 96, said :—" When, therefore, Congress undertakes to enact a law, which can only be valid as a regulation of commerce, it is reasonable to expect to find on the face of the Statute, or from its essential nature, that it is a regulation of commerce with foreign nations, among the several States, or with the Indian tribe. If it is not so limited, it is in excess of the power of Congress. If its main purpose be to establish a regulation applicable to all trades ; to commerce at all points, especially if it is apparent that it is designed to govern the commerce wholly between citizens of the same State, it is obviously the exercise of a power not confided to Congress."

"That principle is applicable here. There is nothing in Part VII., the only portion of the Trades Mark Act 1905 brought into question, to confine its operations exclusively to inter-state trade or trade with other countries, and as there is no way by which the Court could in the Statute separate that which is within from that which is without the powers of the Legislature, the whole Part must be declared void." *Per O'CONNOR, J. in Attorney-General for New South Wales v. Brewery Employees' Union of New South Wales*, (1908) 6 C.L.R., at p. 546.

### **Inquiries as to Inter-State and External Trade.**

The provisions of section 15 (b) of the Australian Industries Preservation Act 1906 authorizing the Comptroller-General of Customs to subject persons engaged in inter-state and external trade, to compulsory interrogation respecting their business operations, are a valid exercise of the commerce power. It is to make the power of inquiry effective for the purposes of customs' administration, for instance, that section 234 of the Customs Act 1901 authorizes

the recovery of penalties against those who fail to answer questions or produce documents when requested so to do by customs' officers acting under the authority of sections 38, 195, 196 and 214. The powers of compulsory interrogation conferred on executive officers of Government under the Audit Act 1901, under the Immigration Restriction Act 1905, and under the Census and Statistics Act 1905 rest upon the same basis. *Per O'CONNOR, J. in Appleton v. Moorehead*, (1909) 8 C.L.R., at p. 377.

### **Commerce Power Reserved to States.**

The following passage from the judgment of the Supreme Court of the United States in the case of *Robbins v. Shelby County Taxing District*, 120 U.S., 489, at p. 493, is instructive, as showing the view accepted in the United States as to the powers of the State Legislatures with regard to such matters. "It is also an established principle, as already indicated, that the only way in which commerce between the States can be legitimately affected by State laws, is when, by virtue of its police power, and its jurisdiction over persons and property within its limits, the State provides for the security of the lives, limbs, health and comfort of persons and the protection of property; or when it does those things which may otherwise incidentally affect commerce, such as the establishment and regulation of highways, canals, railroads, wharves, ferries, and other commercial facilities." Cited by GRIFFITH, C.J. in the *Federated Amalgamated Government Railway and Tramway Service Association v. The New South Wales Railway Traffic Employees' Association*, (1906) 4 C.L.R., p. 544.

### **A Commonwealth Bureau of Commerce and Industry.**

There has been created a Commonwealth Bureau of Commerce and Industry whose functions are to organize commerce and industry throughout the Commonwealth. A Director has been appointed, and steps have been taken to invite the co-operation of those engaged in the great primary and secondary industries of the nation. In his budget speech (September, 1918), Mr. W. A. WATT, the Acting Prime Minister, stated that the Government felt that this Bureau should be free from political control, so that producers, manufacturers, and traders may be encouraged to voluntarily unite in preparatory organization for the important period of reconstruction that will follow the War.

### A Commonwealth Board of Trade.

A Board of Trade, consisting of three Commonwealth Ministers and two outside business men has been created, the functions of which are (1) to investigate and report upon matters referred to it by the Minister ; (2) generally to consider and advise the Government upon matters affecting the trade and industry of the Commonwealth. Already the deliberations of this body have proved of the utmost value, and the Commonwealth Government is hopeful that, as its work develops, its increasing usefulness will be generally recognized by the producing and mercantile community.

### § 47. "AMONG THE STATES."

Commerce includes the navigation of inter-state rivers : *United States v. Chandler Dunbar Co.*, (1912) 229 U.S., 53.

Negotiations in one State for the sale of goods which are in another State for the purpose of introducing them into the State in which the negotiation is made, constitutes inter-state commerce : *Stewart v. Michigan*, (1913) 232 U.S., 665.

Commerce among the States consists of traffic and intercourse between citizens and includes the transportation of persons as well as property. Whilst women are not articles of merchandise, the power of Congress to regulate their transportation in inter-state commerce is the same and it may prohibit their transportation for immoral purposes. The right to be transported in inter-state commerce is not a right to employ commerce and transportation as a facility to do wrong. Congress may therefore prohibit such transportation to the extent provided in the White Slave Traffic Act 1910 : *Hake v. United States*, (1912) 227 U.S., 308.

A sale of goods made in one State to be delivered free on board at a point therein to be delivered to consumers in another State in the original packages, freight to be paid by the purchaser, constitutes inter-state commerce : *Savage v. Jones*, (1911) 225 U.S., 504.

A State police regulation which has a real relation to the proper protection of the people and which is reasonable in its terms and does not conflict with any valid Act of Congress is not unconstitutional because it may incidentally affect inter-state commerce : *Savage v. Jones*, (1912) 225 U.S., 501.

The power given to Congress by the Constitution over inter-state commerce is direct, without limitations and far-reaching: *Hippolite Egg Co. v. United States*, (1912) 220 U.S., 45.

The White Slave Traffic Act 1910 is a legal exercise of the power of Congress under the commerce clauses of the Constitution, and it does not infringe the privileges and immunities of the citizens of the States or interfere with the reserved powers of the States, especially in regard to the immorality of persons within their jurisdiction: *Hake v. United States*, 227 U.S., 309.

### Promoting Inter-State Trade.

Whilst Congress does not possess authority to regulate the internal commerce of a State, it does possess power to foster and protect inter-state commerce, although in taking necessary measures to do so it may be necessary to control intra-state transactions: *Houston Texas Railroad Co. v. United States*, (1913) 234 U.S., 342.

Congress has power under the commerce clauses of the Constitution to regulate the liability of inter-state carriers to their employees for injuries sustained in the course of their inter-state employment, but until it does so act the subject is within the police powers of the States. Since the passing of the Employers Liability Act 1910 in the United States, that Act has been paramount and exclusive and it will so remain unless and until Congress shall again remit the subject to the States: *Reid v. Colorado*, 187 U.S., at p. 137; *Michigan Central Canal and Railroad Co. v. Vrieland*, (1912) 227 U.S., 59.

### Scope for Commonwealth Legislation.

"It has been urged that if section 92 of the Constitution be treated as applying to more than inter-state duties or charges, the Federal Parliament cannot make any laws as to inter-state trade because the power in section 51 (1.) is expressly given "subject to this Constitution." But, in the first place, section 92 forbids only laws obstructing inter-state commerce; whereas laws may also be made facilitating or encouraging inter-state trade as well as obstructing it: section 102; forbidding preference is a qualification of the power to make such encouraging laws. In the second place, this argument tends strongly to support the view that section 92 was meant to be a restraint on the States and not on the Commonwealth Parliament. In the United States there is nothing to prevent Congress from imposing border duties between the States—nothing in

the Constitution to prevent it. But I concur with the Chief Justice in thinking that this matter should be left open." *Per HIGGINS, J.* in *Duncan v. The State of Queensland*, (1917) 22 C.L.R., at p. 637.

### **Navigation and Shipping.**

In the *Australian Seamen's Compensation Case*, (1914) 19 C.L.R., 298, the High Court was divided on the question whether section 98—navigation and shipping—was an extension of the trade and commerce power granted by section 51 (1.). In support of the validity of the Seamen's Compensation Act 1911 it was urged that if it could not be sustained by section 51 (1.) it could at any rate be sustained under section 98; that the words "navigation and shipping" were words of extension, enlarging the ambit of the commerce power so as to embrace matters which were not strictly speaking, matters of trade and commerce, such as the conditions of employment within the range of inter-state and external trade and commerce; that the words "navigation and shipping" in section 98 included power to deal with any matter such as, though not really inherent in or incidental to, trade and commerce between the States or with other countries, had been embraced in the multifarious provisions of the Imperial Merchant Shipping Acts.

On the other hand, as against this extension argument, it was contended that section 98 was not intended to amplify the trade and commerce power beyond the sphere of inter-state and external trade, but to explain as to the included subject matter by removing grounds for possible doubt. The extension view, involving the validity of the Seamen's Compensation Act, based on sec. 98 of the Constitution was sustained by the majority of the High Court, viz.: ISAACS, GAVAN DUFFY, POWERS and RICH, JJ., GRIFFITH, C.J. and BARTON, J., dissenting: *Australian Steam Navigation Co. Ltd. v. Malcolm*, (1914) 19 C.L.R., 298.

### **Federal Power to Impose Penal Laws.**

The Customs Act 1901 was passed in pursuance partly of the grant of power conferred by the Constitution, section 51 (1.). Trade and commerce; 51 (II.), taxation; 52 (II.), control of departments. and 51 (XXXIX.), matters incidental. Section 233 of that Act is as follows:—"No person shall smuggle or unlawfully import, export, convey or have in his possession any goods." The *prima facie* meaning of those words would be to make it an offence for a person to have in his possession unlawfully any goods. Obviously that

cannot be the meaning of the words, because there is no power under the Constitution for the Federal Parliament to usurp the general law-making power of the States in criminal matters. The Federal Parliament has only power to make such criminal laws as may give a sanction to the execution of Statutes which it has power to pass. Consequently a literal reading of those words would place them beyond the legislative powers of the Commonwealth, and would defeat the operation of the Act altogether. But, of course, that is not a construction which the Court would adopt, because it is well known that the Court will lean to such a construction as will bring the Statute within the power of the Legislature whose Act is in question. It cannot be disputed that the Federal Parliament has power to pass legislation ancillary to the due execution of Customs laws ; but another question remains behind, and it is this :— In interpreting a penal law, where the words used are wide and large, are we to arrive at a meaning which makes a crime by construction, or is the reasonable interpretation of words, which in their essence are somewhat ambiguous, to be that which allies the act sought to be punished most closely to the purpose of the legislation ? *Per BARTON, J. in Lyons v. Smart, (1908) 6 C.L.R., 154.*

### **PROPOSED CONSTITUTIONAL AMENDMENT OF THE COMMERCE POWER.**

On the 26th April, 1911, a proposed constitutional amendment of section 51 (1.), altering it to read as follows, was submitted to the people of the Commonwealth by Referendum.

51 (1.)—" Trade and Commerce."

This amendment failed to secure the necessary constitutional ratification. On 31st May, 1913, a similar constitutional amendment with an addition was submitted to the people; with the addition the amended section would have read thus :—

51 (1.) " Trade and Commerce, but not including trade and commerce upon railways the property of a State except so far as it is trade and commerce with other countries or among the States."

The amendment failed to secure the necessary Constitution ratification.

For Referenda returns showing the votes of the people in the several States, see *supra*, p. 21.

The effect of either of these alterations would be to give the Federal Parliament concurrent authority with the State Parliaments



to make laws relating to the internal domestic trade and commerce of each State subject to the rule that where the State laws conflict with the Federal laws the latter would prevail (Constitution, section 109).

### **Federal Considerations.**

In introducing these proposed amendments of the Constitution the Attorney-General, Mr. W. M. HUGHES, asked the House to consider them on their merits, without reference to any such questions as unification, State rights, or the Federal ideal. Federalists are not prepared to accept this invitation. Whilst they are willing to fairly consider any proposed amendments of the Constitution, their guiding principles are two in number. In the first place, no proposition for an amendment of the Constitution should be made merely on theoretical grounds, or with a view to complying with the desires of any political party. Certain facts and conditions must be proved in order to show the public necessity which exists for any such amendment. Secondly, and without any reservation, Federalists insist upon the condition that in no case should any change be made in the Constitution unless it is in harmony with the Federal principle. They agree that the amending power contained in the constitutional instrument is an integral and vital power, and should be brought into use under proper conditions. They do not regard the Constitution as sacrosanct and beyond the reach of amendment when necessary. But our Constitution is not merely a legal document—it is an instrument of government which contains what may be described as the very home and citadel of our national life. It should not be lightly altered. If necessary changes must be made, they should be made along the lines of the Constitution itself. It was intended that that charter of government should grow and expand according to national requirements and national aspirations. But proposed changes should not be brought forward in bushels merely for the purpose of meeting party cries, or the demands of party necessities.

### **Fundamental Principles.**

It is proposed to deal here with the question of what may be regarded as the fundamental principles of our Constitution. A federation could be roughly defined as a dual form of government in which the sovereign powers are divided between two sets of governmental agencies ; one set being conferred upon the Federal

group, and the other set being reserved to the States. These sovereign organs of government are vested with the powers of sovereignty as a whole. They do not exercise antagonistic powers. They represent the distribution of the whole of the sovereignty of the community and, there is not necessarily any antagonism between the Federal or National governing portion of the sovereignty and the State or Provincial group.

They are all agents of the same people—they are merely assigned different classes of work. Shortly, a system of federation is a system in which there is practically a division of labour among different agencies of the same people. The reasons in favour of the adoption of a Federal system may be briefly summarized in order to show its advantages as contrasted with a unification.

#### **The American Model.**

The Australian Commonwealth is in law and in fact a truly Federal system of government, and it is admittedly based upon the American model which is considered the most perfect and the most justly balanced system of Federal government in the world. The late Mr. W. E. GLADSTONE said that the Federal Government of the United States was the most wonderful system of government ever designed by the wit and wisdom of man; because it contains that scientific and well-classified distribution of power between the Federal Government on the one hand and the State Governments on the other. The Australian system is based on that model. The framers of our Constitution did that deliberately and designedly. They thought that they might fairly follow a model such as that of the United States, which had been adopted by the people of the British race of over one hundred years ago, which had worked successfully so long in the American Republic.

The Civil War arose from no imperfections in the Federal system of government, but out of a domestic question, namely, slavery. Apart from that tragic incident the whole history of the United States has been based upon the Federal system of government. As showing what the people of that country think of their Constitution, after more than one hundred years of experience of it, and even after the Civil War, we may quote from the manifesto of the Democratic party of the United States, which was published in connection with the Presidential election in 1912:—

“ We declare that all powers not specifically granted to the Federal Government belong to and of right must be exercised by, the States in their sovereign capacity, and we assert that the most effective results in government are attained by the complete exercise by the States of these reserved sovereign powers. We are unalterably opposed to any usurpation by the Federal Government of the rights of the States.”

That was the manifesto of the Democratic party which was triumphant at the polls, and which, for six years, had a majority in both the House of Representatives and the Senate of the United States. That did not show that the people in the majority of the States of America were in any way dissatisfied with that instrument of government which was accepted as the model of the Constitution of Australia. If it were their experience that their Constitution was defective and imperfect, lacking the powers proposed to be given to the Commonwealth by the amendments under discussion, the need for such amendment would have been disclosed, and a great party would have arisen to demand it.

#### **Anti-Federal Tendencies of Proposed Amendments.**

The tendency of the fundamental changes proposed in this and other amendments is to alter the structure, scope, and character of our Federal system of Government for all time. The amendments, if carried, would tend to alter most materially the relations of the States and the Commonwealth. If the amendments are made, the Federal Parliament would grasp vast powers, and would undertake a mass of functions at present belonging to the States, and which should be reserved to them. What was proposed would be an interference with the States and an impairment of their usefulness. The relations of the States with the Federal Government may be said to constitute “ the real stuff and essence ” of our system of government ; those relations would be destroyed if the amendment were carried.

#### **Principle of Distribution of Powers.**

In deciding upon the distribution of powers, the Australian Federal Convention was guided, not only by the model of the United States Constitution but by special considerations. It was thought that there should be reserved to the States all powers affecting private rights, municipal functions, local interests, resources, and trade ; that they should control the administration of justice and local

governing communities, and have free opportunity for internal development and local option, and choice in internal affairs. To the Commonwealth were ceded such powers as are of a truly national Australian character, whether relating to commerce, industry, finance, economics, defence or external affairs. It would have been a great calamity had the Convention drawn up an instrument of government intended to last as the citadel of national life for all time, merely in a haphazard manner, without reference to fundamental and guiding principles.

**Not a Matter of Sovereignty but of Vitality.**

The distribution outlined involves not merely a matter of sovereignty or abstract reasoning, but one of vitality. It was not the jealousies of small States, but political statesmanship, expediency and necessity that demanded the adoption of this principle of division. The Federal Parliament, as the central institution of government, no doubt looms largely upon the political horizon of Australia, and, unconsciously, its members are greatly impressed with a sense of their importance. But if their powers and work are compared with the powers and work of the State Parliaments, it will be seen that they are much less useful, and have much less to do in governing Australia, than the State Parliaments. The success of the Commonwealth as a whole depends, not so much on the legislation and activity of the Federal Parliament as upon the legislation and activity of the State Parliaments. They have reserved to them the right of controlling all domestic institutions, the home life, the education, the land and the primary resources of Australia, from which are derived the springs of our national life, domestic, social, industrial, and commercial. The Federal Parliament should not arrogate to itself powers of government which may be better left to the States, and can be better exercised by them.

**Powers Reserved to the States.**

The powers left to the States are of a purely local, domestic, and provincial character, and were left to them because it was believed that the Parliaments of the States, having special knowledge of local conditions, could be better trusted to solve local problems.

**Federal Powers.**

To the Federal Parliament were assigned powers permitting legislation of a uniform character, operative throughout the length and breadth of Australia. It was not intended that this Parliament

should pass laws applicable to parts of Australia only. The power of dealing with local questions and the making of local differentiations, in accordance with territorial differences and conditions, was left to the States. The test of a Federal power is this: Will its exercise yield laws of general application, suitable to every part of the Commonwealth, and capable of application throughout the States? Where there must be a variety of laws or regulations, differing with parallels of latitude, or according to local conditions, their enactment is best left to the States. The fundamental distinction between a Federal law and a State law is that the first must be universal and general in its application, and the second applicable to local circumstances. A power that must be exercised differentially is not a Federal power, and should be left to the States.

### **The Trade and Commerce Power.**

Let us illustrate what is meant by a reference to the trade and commerce proposals. The Attorney-General, in introducing the Bill to amend the Constitution, objected to the constitutional limitation of the Federal power to make laws relating to trade and commerce between the States and with other countries. He said that this was objectionable, and led to confusion, being an artificial restriction, while commerce is an organic whole. He drew attention to what he considered the serious consequences flowing from a division of the power. It is submitted that this section of the Constitution is based on the true Federal principle, that the present division of power between the Federation and the States is truly Federal. What concerns the whole of Australia should be reserved to the Federal Parliament, and what concerns each particular part or State of Australia should be reserved to the part or State. There is, therefore, a logical differentiation of power based, not on the difference in commerce itself, but on the operation of commerce.

A branch of trade or commerce which begins in a State and ends in a State, is reserved to the State, because the State alone is interested in it, but when the course of trade and commerce moves across the boundary, and enters another State, it becomes Federal, because more than one State is interested, and it admits of laws of general application. Trade and commerce matters which are internal or domestic, may be fairly left to be dealt with by the State authorities. What concern, for instance, has the State of New South Wales in the internal shop-keeping arrangements of the State of Victoria?

There is no community of interest whatever. The State of Victoria has a perfect right to make its own shop-keeping arrangements relating to the hours of opening and closing, and the conditions of labour. When, however, trade and commerce flows across the boundary, it becomes truly Federal and Australian—affecting certainly more than one State—and falls within Federal control.

### **American Experience.**

This trade and commerce section admittedly is taken from the American model ; and it has operated successfully in the United States for over one hundred years. There has never been any serious complaint in the great Republic, on the part of the Federation on the one hand, or of the numerous States on the other, leading to any agitation for change or reform. There have been several suggestions for the alteration of the Constitution, but no party up to the present, has urged that the rights of the States to deal with their own internal shop-keeping arrangements shall be taken away and conferred on the Federation.

### **Possible Operation of Amendments Illustrated.**

If the proposed amendment had been carried, it would have enabled Federal laws to supersede State laws in reference to the local internal domestic trade and commerce solely carried on within a State, viz. :—

Adulteration of wine, beer, spirits, seed, manure, etc. ;  
Auctioneers, peddlers, hawkers ; sales by  
Bakers, millers, butchers, grocers, drapers ; sales by  
Bills of sale, commercial instruments and securities ;  
Carriers and all means of traffic and transport, freights and  
rates ; supervision of  
Chemists and druggists ; sales by  
Coal and firewood ; sales of  
Firms ; registration of  
Fruit cases, bags and sacks ; sale of  
Gold buyers and sellers ; sales by  
Goods, wares and merchandise, wholesale and retail ; sales  
of and forms of making contracts therefor ;  
Local option and licensing laws ; regulating the sale of  
intoxicants and other goods  
Marine stores and old metals ; sales of  
Markets, municipal and private :

Milk and dairy products ; sale of  
Newspapers ; registration and sales of  
Poisons and explosives ; sales of  
Prices and profits in buying and selling goods ;  
Pure food laws : margarine ;  
Shipping and navigation in the territorial waters, rivers and  
lakes of a State ;  
Sundays and holidays ; regulation of  
Traction engines ; regulation of  
Trade names, descriptions, marks, union lodge and union  
labels ;  
Tramways ; supervision of  
Vegetation diseases.

### **The Union Label.**

If this amendment had been carried, it would have been within the competence of the Federal Parliament to pass legislation legalising the use of the " Union Label." Under the Constitution as it stands, the High Court has held that the Federal Parliament cannot do this, but the proposed amendment enabled the Federal Parliament to reverse the decision of the High Court and make the use of the union label quite lawful. Those who are aware of the outrageous use of the union label in America and its power as an instrument of boycott and terrorism will realise the necessity of resisting the proposal to confer power on the Federal Parliament which might be used in such a manner and for such a dangerous purpose.

### **Prices and Profits.**

In the United States it has been decided that under the inter-state and foreign commerce power Congress can regulate freights and probably prices upon the sale and transport of goods in inter-state commerce. It was so decided in the case of *In re Green*, quoted by Mr. P. M. GLYNN in the course of the debates (*Hansard*, 1912, page 6386). That was the case in which it was attempted to regulate the profits of a corporation, formed under a law of a State. The Supreme Court held that while Congress could not control the operations of that combination in regard to domestic commerce it could control its operation in regard to inter-state commerce. The power to regulate freights by means of the Inter-state Commerce Commission has been deduced from the commerce power and similarly the power to regulate profits and prices is capable of deduction.

If Congress can regulate inter-state and foreign freights it may well be contended that it can regulate prices. What Congress can do under the commerce power can be done by the Federal Parliament under that power. By this amendment, extending the power to the Federal Parliament of the internal and domestic commerce of a State, that Parliament would probably be able to dictate the prices and profits upon the sale of commodities in both wholesale and retail dealings within the boundaries of a State. This, of course, would be a much more sweeping and more drastic extension of the power than it at present possesses in connection with inter-state and foreign trade.

### **No Public Demand for Change.**

There had been no serious public demand, and no argument to justify the proposal, except that it was for the purpose of removing what was said to be "an anomaly." There is no anomaly whatever; and there ought not to be an alteration of the Constitution merely because in the view of a Minister, the divided power may lead to confusion. Why enter on a constitutional campaign of this magnitude, for which there had been no public demand, and, no public need? Besides, this alteration, if carried, would mean a violation of the Federal principle—the taking away from the States of powers which may be fairly and properly exercised by them to better advantage, greater efficiency, and with greater satisfaction to the people.

### **Increased Federal Authority over Contracts.**

Furthermore, this power, if granted, would have extended the jurisdiction of the Federal Parliament to contracts generally. Parliament would have power to regulate the form, mode, conditions, and manner of making of all kinds of local, domestic and internal contracts, such as bills of sale, stock mortgages, and other things which might really be left to the local desires and requirements of each and every particular State.

### **Penal Legislation.**

In addition to giving power over contracts—and that is a very vast area—this amendment would give the Federal Parliament power over a large body of penal legislation. It would have authority to pass laws relating to all kinds of offences against trade and commerce laws, within a State.



**Local Option Interfered with.**

So that increased Federal power over trade and commerce would be much wider than appears upon the face of the amendment. It would not only be confined to local trade and commerce arrangements, but the field of legislative activity would be extremely wide and important. It would bring the Federal authority into conflict with what may be regarded as the local option requirements of the State Legislatures and with municipal corporations.

**Internal Trade and Traffic of States.**

There is certainly no public demand whatever for this drastic alteration of the Constitution, which is to give the Commonwealth power and control to regulate all the internal means of exchange, travel and transportation of goods and passengers; all the internal instrumentalities of a State, navigation, roads and rivers, freight, and rates, wharfage and tolls, and so forth.

**Alleged Neglect of State Parliaments.**

A final argument resorted to in support of this amendment was that the State Parliaments of Australia had neglected to pass commercial laws for the protection of the public against the sale of shoddy goods, or goods sold under false trade names and trade descriptions.

This was a charge which was easily refuted by reference to the Sale of Goods Acts in force in all the States and to the Commonwealth Trade Marks Act. If a person buy goods by description there is in every sale an implied condition that the goods shall correspond to description. A person selling goods on the strength of false description would not only be liable to an action for breach of contract but to a criminal prosecution for obtaining money by means of false pretences. The Federal Trade Marks Act provides very severe penalties against persons selling or attempting to sell goods to which a registered trade mark is falsely applied.

**Centralization and Unification.**

If this amendment be at any time carried, the people of Australia might as well march right on to the goal of complete centralization, unification and the obliteration of the States. If this demand were conceded, no important powers would be left to the States, except their control over education, land, and railways. The Federal

authority would completely overshadow the States, not merely in Australian matters—not merely in inter-state and external matters—but it would dominate the whole political landscape.

51. (II.) Taxation<sup>48</sup> ; but so as not to discriminate<sup>49</sup>  
between States or parts of States :

**Conspectus of Notes to Section 51 (ii.).**

§ 48. "TAXATION."

Legislation.

Customs Administration Act 1901-1910.

Customs Tariff 1902.

Customs Tariff Bill (British Preference) 1906.

Customs Tariff (South African Preference) 1906.

Customs Tariff (Agricultural Implements) 1906.

Customs Tariff Act 1908.

Customs Tariff Validation Act 1917.

Excise Administration Act 1901.

Distillation Administration Act 1901-1918.

Beer Excise Administration Act 1901-1918.

Spirits Administration Act 1906-1918.

Excise Tariff Act 1902-1906.

Excise Sugar Tariff 1905-10-12.

Excise Tariff Agricultural Implements 1906.

Excise Tariff (Spirits) 1906.

Excise Tariff 1908.

Excise Tariff (Starch) 1908.

Excise Tariff Validation 1917.

Bank Note Tax 1910.

Land Tax Act 1910.

Land Tax Assessment Act 1910.

Estate Duty (Probate) Tax 1914.

Income Tax Act 1915-16-17.

Entertainment Tax Act 1916.

War-time Profit Tax Act 1917.

Revenue from taxation.

Meaning of taxation.

Mode of exercising the taxing power.

Indirect effect of taxes.

Limitation of the taxing power.

Ambit of the taxing power.

Land taxation and land settlement policy.

Taxing shareholders in land companies.

Husband and wife ; joint liability.

Taxation of Crown leaseholds.

Colonial Laws Validity Act 1865.

Customs import duties.

§ 48. "TAXATION."—*continued.*

Penal taxation of oleomargarine.  
Handling taxable goods.  
Death and succession duties.  
State instrumentalities when immune.

## § 49. "BUT SO AS NOT TO DISCRIMINATE."

Discrimination, meaning of  
Differential rates of wages.

## § 48. "TAXATION."

## LEGISLATION.

## CUSTOMS (MACHINERY) (KINGSTON) ACT 1901-1916.

The administration of the Customs law and the assessment, enforcement and collection of customs duties, is regulated by the Customs (Machinery) Act 1901, which, as slightly amended by the Customs Act 1916, is known as the Customs Act 1901-1916. Part II. dealing with administration, provides for the appointment of a Comptroller-General of Customs who, under the Minister (i.e., the Minister of Trade and Customs, who administers the Customs and Excise Acts) is the permanent head of the department, and has the chief control of the Customs throughout the Commonwealth. In each State there is a Collector of Customs who, subject to the Comptroller, is the chief officer of customs for the State. Power is given to the Minister and also (subject to the approval of the Minister) to the Comptroller, to delegate any of his powers under the Act. Provision is thus made for any degree of centralization or decentralization that may be required. Part III. defines goods which are subject to the control of the Customs, and provides for examination, entries, and securities generally. Part IV. deals with importation, the boarding of ships and report of cargo, the entry, unshipment, landing, and examination of goods; and prohibits the importation of certain goods, such as false money, pirated or blasphemous or obscene works, exhausted tea, and other goods injurious to health or morality. Part V. provides for the warehousing of goods. Part VI. deals with exportation. Part VII. provides for payment of duty on ships' stores consumed on the Australian coast (i.e. between the first port of arrival and the last port of departure of a ship). Part VIII. provides for the payment and computation of duties imposed by the Customs Tariff Acts, and for the determination of the value for duty of goods subject to *ad valorem* duty. Sections 138, 139, 140 and 148, relating to the highest duties to be charged,

substitutes for dutiable goods, duty on parts, duty on condensed articles, and derelict goods are interesting and important as being the subject of judicial decisions. Sections 190, 191 and 192, empowering an officer to fasten hatchways and other openings into the holds, locking up, sealing and securing goods, and prohibiting the breaking of seals, are interesting on the same grounds. Provision is made for the prosecution and punishment of offences and the making of regulations.

#### CUSTOMS TARIFF (KINGSTON-TURNER) ACT 1902.

This was the first Commonwealth Customs Tariff Act imposing uniform rates of customs duties throughout Australia, introduced into the House of Representatives, 8th October, 1901, assented to 16th September, 1902. It provided that uniform duties of customs specified in the Tariff should be imposed as from 8th October, 1901, and from that date onwards the State Tariffs ceased to operate, and trade between the States became free, subject to the temporary exception, under section 95 of the Constitution, of the right of the State of Western Australia to levy duties on goods transferred from other States.

#### CUSTOMS TARIFF BILL (BRITISH PREFERENCE) 1906.

By this Bill, reserved for the Royal assent 12th October, 1906, a special schedule of import duties on a limited number of tariff items was passed for the purpose of giving preference, in the shape of lower duties on goods manufactured in and imported from the United Kingdom than on goods manufactured in and imported from other countries, provided that such first mentioned goods were imported direct in British ships manned exclusively by white seamen. This Bill did not receive the Royal assent because in the opinion of the Imperial law officers it contained provisions contrary to treaties between Great Britain and certain foreign countries.

#### CUSTOMS TARIFF (SOUTH AFRICAN PREFERENCE) 1906.

This Act established the scheme of preferential duties of customs on certain goods the produce or manufacture of British Colonies or Protectorates in South Africa included within the South African Customs' Union; assented to 12th October, 1906.

#### CUSTOMS TARIFF (AGRICULTURAL IMPLEMENTS) 1906.

In anticipation of the revision of the Tariff then pending, this Act, assented to on 12th October, 1906, contained an instalment of

amended increases of customs duties dealing specially with stripper, harvesters, stump-jump ploughs, and other agricultural implements and machinery. A special feature of this Act was section 4, which provided that if the Governor-General was satisfied that the cash prices at which stripper harvesters and drills manufactured in Australia were sold exceeded the prices thereunder set out, he might, by proclamation, reduce the rate of duty specified in the schedule in respect of stripper harvesters, but so that the reduction should not reduce the rate of duty below one-half the rate of duty imposed by that Act.

#### CUSTOMS TARIFF (LYNE) ACT 1908-1911.

This Act repeals section 5 of the Customs Tariff 1902, No. 14 of 1902, and the schedule of that Act, also the whole of the Customs Tariff 1906. A new scheme of customs duties was introduced and embodied in schedule A. A feature of this Act was the imposition of special duties set out in one column of the schedule, on a large quantity of goods, the produce of and manufacture of the United Kingdom shipped in the United Kingdom to Australia, at lower rates, compared with the rates of duty set out in another column headed "General Tariff" applicable to all other goods. Amended by Customs Tariff Amendment 1908, Customs Tariff 1910, and Customs Tariff 1911, Customs Tariff Validation Act 1917.

#### EXCISE (MACHINERY) ACT 1901.

This Act provides for the administration of the Excise Acts. and the assessment, enforcement and collection of excise duties, on similar lines to those embodied in the Customs Act with regard to customs duties; and contains general provisions relating to the manufacture of goods and materials in respect of which excise duty is imposed by Parliament.

#### EXCISE ACT 1918.

This was an Act to amend the Excise Act 1901. Certain machinery clauses were altered, and a scale of fees for licensees to manufacture tobacco, cigars, cigarettes and snuff were fixed at from £5 to £500 per year.

#### SPIRITS (MACHINERY) ACT 1906.

This Act contains elaborate provisions for the granting of certificates in the prescribed form certifying that spirits are "Pure Australian Standard Brandy" or "Australian Blended Brandy"

or " Australian Standard Malt Whisky " or " Australian Blended Whisky " or " Australian Standard Rum " as the case requires. It also forbids spirits (Australian or imported) to be delivered from customs control for human consumption unless the Collector is satisfied that they have been matured by storage in wood for two years. It also provides for the methylation of spirits and the use of methylated spirits.

**SPIRITS ACT 1918.**

The definitions of medicines, methylated spirits, " Pure Australian Standard Brandy," and " Australian Blended Brandy," contained in the Spirit Act 1906, are verbally amended by this Act. " Pure Australian Standard Brandy " must be made from wine, the fermented juice of fresh grapes, and " Australian Blended Brandy " must be distilled wholly from wine, the fermented juice of fresh grapes, and must contain not less than 25 per cent. pure wine spirit, which has been separately distilled from the fermented juice of fresh grapes by a pot still or similar process at a strength not exceeding 40 per cent. over proof.

**DISTILLATION (MACHINERY) ACT 1901.**

This Act applies to the distillation of spirits on which duty of excise is imposed by Parliament. No person is allowed to distill spirits unless he has a licence to do so under this Act.

**DISTILLATION ACT 1918.**

The annual fees for distillation licences are fixed by the first schedule to this Act as follows: viz.: For every spirit maker's general licence £50; for every spirit maker's wine distilling licence £25; for every vigneron licence £5.

**BEER EXCISE (MACHINERY) ACT 1901.**

No person is permitted to make beer except in pursuance of the Act, and unless he is licensed to do so under the Act.

**BEER EXCISE ACT 1918.**

The annual fees for brewers' licences are prescribed by the 4th schedule of this Act, ranging from £25 per year for every brewery wherein beer is brewed in quantities not exceeding in any one year 50,000 gallons, to £250 per year where the beer brewed exceeds 12,000,000 gallons per year.

**EXCISE TARIFF 1902.**

The first uniform duties of excise on goods produced in Australia were imposed by the Excise Tariff Act 1902. These duties were made retrospective in operation as from 8th October 1901, that being the date of the imposition of uniform duties of customs throughout the Commonwealth. Excise duties were imposed on beer, spirits, starch, sugar and tobacco. With reference to sugar a rebate was granted to the growers of "white-grown sugar." This rebate was afterwards abolished by the Sugar Rebate Abolition Act, and a bounty on production was substituted.

**EXCISE TARIFF (SUGAR) 1905-10-12.**

The excise duty of 4/- per cwt. of manufactured sugar was altered by the Excise Tariff 1905, and the Excise Sugar Tariff 1910. It was finally abolished by the Sugar Excise Abolition Act 1912 (proclaimed 26th January 1913). This was done in pursuance of an arrangement made with the Government of Queensland to prohibit the employment of coloured labour on sugar plantations in consideration of the repeal of the Federal excise duty on sugar and bounty to growers of "white-grown" sugar.

**EXCISE TARIFF (SUGAR) 1913.**

On the 20th October, 1913, the excise duty of 4/- per cwt. on manufactured sugar was temporarily restored in order to validate the collection of duty on sugar produced from cane delivered for manufacture after 1st May, 1913 (the date of repeal of the sugar excise tariff) and before 26th July, 1913, and on all other sugar produced in Australia which was subject to the control of the customs on 25th July, 1913, "on which duty of excise had not been paid under previous tariff." After the Comptroller has certified that all outstanding cane sugar and beet sugar of the estimated amount within the meaning of the Act had been entered for home consumption, the Act provided that the cane and beet sugar "shall hereafter not be liable to excise duty."

**EXCISE TARIFF (AGRICULTURAL MACHINERY) 1906.**

This Act imposed a scheme of excise duties at fixed rates on stripper harvesters, stump jump ploughs, and other agricultural implements. made in Australia, subject to the express condition that such excise should not apply to goods manufactured by any person in any part of the Commonwealth under conditions as to the

remuneration of labour which—(a) are declared by resolution of both Houses of the Parliament to be fair and reasonable ; or (b) are in accordance with an industrial award under the Commonwealth Conciliation and Arbitration Act 1904 ; or (c) are in accordance with the terms of an industrial agreement filed under the Commonwealth Conciliation and Arbitration Act 1904 ; or (d) are, on an application made for the purpose to the President of the Commonwealth Court of Conciliation and Arbitration, declared to be fair and reasonable by him or by a judge of the Supreme Court of a State or any person or persons who compose a State industrial authority to whom he may refer the matter.

**EXCISE TARIFF (SPIRITS) 1906.**

This Act repealed the tariff of 1902 as to spirits, and substitutes an elaborate schedule of duties on different kinds of spirits, based on the classification of the Spirit Act 1906 and varying according to materials of origin and modes of distillation and manufacture.

**EXCISE TARIFF 1908.**

This Act introduced new excise duties on tobacco, cigars, cigarettes, snuff, amylic acid and fusel oil, glucose, invert sugar, invert syrup, saccharin and other similar substitutes for sugar, golden syrup and other syrups.

**EXCISE TARIFF (STARCH) 1908.**

By this Act starch made from imported rice delivered free for use in the manufacture of starch was made liable to the excise duty of 1d. per lb.

**EXCISE TARIFF VALIDATION 1917.**

This Act validates proposed tariff duties of excise introduced into the House of Representatives on 3rd December 1914.

**BANK NOTES TAX 1910.**

In order to prevent private banks continuing to issue bank notes payable to bearer after the establishment of the Commonwealth Note Issue, the Bank Notes Tax Act 1910 was passed. It imposed a tax at the rate of 10 per cent. for each year in respect of all bank notes issued and re-issued by any bank in the Commonwealth.



## LAND TAX ACT 1910-1918.

## LAND TAX ASSESSMENT ACT 1910-1916.

The Land Tax Act 1910 imposed a progressive tax upon the taxable value of all the land in the Commonwealth owned by the taxpayer. The tax was upon unimproved land values, and there were two scales of tax, one as against residents in Australia, and one against absentees from Australia. In the case of residents, the taxable value is the total unimproved value, less a deduction of £5,000. For so much of the taxable value as does not exceed £75,001 the rate of tax per £1 sterling is 1d. and 1/30,000th of 1d. where the taxable value is £1 sterling, and increases uniformly with each increase of £1 sterling of the taxable value by 1/30,000th of 1d.

The tax increases uniformly, with each increase of £1 in taxable value, in such a manner that the increments of tax are as follows :—

Between £15,000 and £15,001	=	2d.
Between £30,000 and £30,001	=	3d.
Between £45,000 and £45,001	=	4d.
Between £60,000 and £60,001	=	5d.
Between £75,000 and £75,001	=	6d.

For every £1 sterling of taxable value over £75,000 the rate is 6d. per £1. Thus it will be seen that the tax rises by 1/30,000th of 1d. for every additional £1 of value until £75,000 in value is reached. For every £1 of taxable value in excess of £75,000 the rate is 6d. in the £1. For absentees from Australia, the taxable value is the total unimproved value without deduction. An absentee pays 1d. in the £1 on the first £5,000 (which in the case of residents is exempt) and 1d. in the £1 more than a resident on the balance.

The Land Tax Assessment Act 1910 contains provisions (based to a certain extent on New Zealand legislation) for defining the liability of different kinds of owners, and for preventing the incidence of the progressive rate being evaded by devices of conveyancing, company-making, etc.

Land tax is payable by the owner of land upon the taxable value of all the land owned by him and not exempt from taxation under the Act. The taxable value of all the land owned by a person is—

- (a) in the case of an absentee—the total sum of the unimproved value of each parcel of land ;
- (b) in the case of an owner not being an absentee the balance of the total sum of the unimproved value of each parcel of the land, after deducting the sum of £5,000.

Every part of a holding which is separately held by any occupier, tenant, lessee or owner, is deemed to be a separate parcel.

“ Unimproved value,” in relation to land, means the capital sum which the fee simple of the land might be expected to realize if offered for sale on such reasonable terms and conditions as a *bona fide* seller would require, assuming that the improvements (if any) thereon or appertaining thereto and made or acquired by the owner or his predecessor in title had not been made.”

The following lands are exempt from taxation under the Act :—

- (a) all land owned by a State, or by a municipal, local, or other public authority of a State ;
- (b) all land owned by a savings bank regulated by any State Act ;
- (c) all land owned by any Society registered under a State Act relating to friendly societies or trade unions ;
- (d) all land owned by any building society registered as a building society under any Act or State Act, not being land of which the society has become owner by foreclosure of a mortgage ;
- (e) all land owned by or in trust for a charitable or educational institution, if the institution, however formed or constituted, is carried on solely for charitable or educational purposes and not for pecuniary profit ;
- (f) all land owned by or in trust for a religious society, the proceeds whereof are devoted solely to the support of the aged or infirm clergy or ministers of the society or their wives or widows or children, or to religious, charitable or educational purposes ;
- (g) all land owned by or in trust for any person or society and used or occupied by that person or society solely as a site for a place of worship for a religious society, or a place of residence for any clergy or ministers or order of a religious society ; a charitable or educational

institution not carried on for pecuniary profit ; a building owned and occupied by a society, club or association, not carried on for pecuniary profit ; a public library, institute, or museum ; a show ground ; a public cemetery or public burial ground ; a public garden, public recreation ground, or public reserve ; a public road : or a fire brigade station.

- (h) All land owned by a resident person whether in one or more parcels not exceeding £5,000 unimproved value.

#### LAND TAX ACT 1914.

By the amending Land Tax Act 1914 the first schedule of the original Act was amended to provide that the rate of tax when the owner is not an absentee shall be as follows :—For so much of the taxable value as does not exceed £75,000, the rate of tax per £1 sterling shall be 1d. and 1/18,750th of 1d., where the taxable value is £1 sterling, and shall increase uniformly with each increase of £1 sterling of the taxable value by 1/18,750th of 1d. For every £1 sterling of taxable value in excess of £75,000 the rate of tax shall be 9d.

The rate of tax when the owner is an absentee shall be as follows :—For so much of the taxable value as does not exceed £5,000 the rate of tax per £1 sterling shall be 1d. For so much of the taxable value as exceeds £5,000, but does not exceed £80,000, the rate of tax per £1 sterling, shall be 2d. and 1/18,750th of 1d. where the excess is £1 sterling, and shall increase uniformly with each increase of £1 sterling in the taxable value by 1/18,750th of 1d. For every £1 sterling of taxable value in excess of £80,000 the rate of tax shall be 10d.

#### LAND TAX ACT 1918.

By the Land Tax Act 1918 an additional land tax of 20% of the tax payable under the 1914 Act was levied for 1918-19 *et seq.*

#### INCOME TAX ACT 1915-16.

##### INCOME TAX ASSESSMENT ACT 1915-16.

Income tax is levied and paid to the Commonwealth upon the taxable income from property and personal exertion. The rate of income tax in respect of income from personal exertion is that set forth in the first schedule to the Act. The rate of income tax in

respect of income derived from property is that set out in the second schedule to the Act. Income tax in respect of the total taxable income derived partly from personal exertion and partly from property is that set out in the third schedule to the Act. Income tax is payable at such rates as may be declared by Parliament from time to time.

In order to arrive at the taxable income of taxpayers the total assessable income derived by taxpayers from all sources in Australia is taken as the basis and from it numerous deductions of losses, outgoings and expenses are allowed.

The Income Tax Act 1917 following the lines of the Act of 1915 and 1916 provided that for the financial year beginning 1st July, 1917, the income tax should be as follows :—

#### RATE OF TAX UPON INCOME DERIVED FROM PERSONAL EXERTION.

For so much of the whole taxable income as does not exceed £7,600 the average rate of tax per £1 shall be 3d. and  $3\frac{800}{1000}$ ths of 1d. where the taxable income is £1, and shall increase uniformly with each increase of £1 of the taxable income by  $3\frac{800}{1000}$ ths of 1d.

The average rate of tax per £1 for so much of the taxable income as does not exceed £7,600 may be calculated from the following formula :—

$R$  = average rate of tax in pence per £1.

$I$  = taxable amount

$R$  = taxable income in pounds sterling.

$R = (3 + 3\frac{800}{1000} I)$  pence.

For every £1 of taxable income in excess of £7,600 the rate of tax shall be 60 pence.

#### RATE OF TAX UPON INCOME DERIVED FROM PROPERTY

(a) For such part of the taxable income as does not exceed £546 the average rate of tax per £1 shall be that given by the formula, viz. :—

$R$  = average rate of tax in pence per £1.

$I$  = taxable income in pounds sterling.

$R = (3 I/181.058)$  pence.

(b) For such part of the taxable income as exceeds £546 but does not exceed £2,000 the additional tax for each additional £1 of

taxable income above £546 shall increase continuously with the increase of the taxable income in a curve of the second degree. See (c) and (d) of 1917 Act, also 3rd and 4th schedules of that Act.

Notwithstanding the schedules it was enacted that the tax payable by any person who is not married, has no dependents and is not an absentee, and who would, apart from sub-section 4 (c) not be liable to pay income tax, shall be £1.

In addition to the tax payable under the preceding provisions of this Act, there is payable, in the case of incomes in respect of which tax is calculated under the first, second, or third schedules, an additional tax equal to 25 per cent. of the tax so calculated.

The following incomes are exempt from the Commonwealth income tax :—(a) the revenue of a municipal corporation or other local governing body or of a public authority ; (b) the income of a society registered under a Friendly Societies Act of the Commonwealth or a State and not carried on for pecuniary profit ; (c) the income of a trade union or of an association of employers or employees registered under any Act of the Commonwealth or a State relating to the settlement of industrial disputes ; (d) the income of a religious scientific, charitable, or public educational institution ; (e) the income derived from the bonds, debentures, stock, or other securities of the Commonwealth issued for the purposes of Commonwealth War Loans authorized up to the first day of January, 1917 ; (f) the income of a provident, benefit, or superannuation fund established for the benefit of the employees in any business ; (g) the salary of the Governor-General and the salaries of the Governors of the States ; (h) the official salaries of foreign consuls and the trade commissioners of any part of the British Dominions. There are certain deductions allowed in favour of mining companies other than coal companies.

#### INCOME TAX ACTS 1917-1918.

Pensions paid under the War Pensions Act 1914-16 are exempt from income tax in 1918 ; so also is the income of any society or association not carried on for the purposes of profit or gain to the individual members thereof, established for the purpose of promoting the development of the agricultural, pastoral, horticultural, viticultural, stock-raising, manufacturing or industrial resources of Australia.

The Income Tax Act 1918 does not apply to the income derived from personal exertion by any person who is or has been on active service outside Australia during the state of war, with the naval or military forces of the Commonwealth or any part of the King's Dominions or of an Ally of Great Britain, from the date of his enlistment in or appointment to those forces until the date of his discharge therefrom or the termination of his appointment.

The following special deductions from taxable income are provided by the Act No. 18, 1918, section 15, viz. :—

(1) In the case of a person (other than a company, an absentee, or a person who is not married and has no dependants) there shall be deducted, in addition to the sums set forth in the last preceding section, 18, the sum of £156 less £1 for every £3 by which the income exceeds £156.

(2) In the case of a person (not being a company or an absentee) who is not married and has no dependants there shall be deducted, in addition to the sums set forth in the last preceding section, 18, the sum of £100 less £1 for every £5 by which the income exceeds £100.

(3) When the income consists partly of income from personal exertion and partly of income from property, the deduction under this section shall be made in the first place from the income from property, and when the deduction exceeds that income the excess shall be deducted from the income from personal exertion.

(4) For the purposes of this section 'income' means the income of a taxpayer after allowing the deductions allowed by any other section of this Act.

The Governor-General may make arrangements with the Governor in Council of a State for the collection by the Commonwealth on behalf of the State of income tax at rates to be fixed by the Parliament of the State on a taxable income ascertained in accordance with this Act or an Act of that State. The Governor-General may make regulations for carrying into effect any arrangement made under the provisions of this section.

The Act of 1918 provided for the collection of income tax for the financial year beginning 1st July 1918. It authorizes the collection of income tax on the basis of the Act of 1917, plus the additional

tax equal to 25 per cent. of the tax authorised in the original schedule, together with the following super-tax, viz. :—In addition to any tax (including additional tax if any) payable under the preceding provisions of this Act other than sub-sections (4) and (5) of section four, there shall be payable a super-tax equal to thirty per centum of the total amount of the tax so payable.

#### ESTATE DUTY (PROBATE) ACT (1914).

#### ESTATE DUTY ASSESSMENT ACT 1914-16.

By this legislation it is provided that duty shall be levied and paid upon the value as assessed on the estates of persons dying in Australia after the passing of the Act. The estates of deceased persons comprise real property in Australia and personal property wherever situated if the deceased was at the time of death domiciled in Australia. If a person dies domiciled outside Australia only his real and personal estate inside Australia is taxable. The duty was fixed as follows, viz. :—Where the total value of an estate (after deducting all debts, including probate and succession duties, paid under State laws) exceeds £1,000, and does not exceed £2,000, the duty is £1 per £100 value and so on in ascending scale up to the value of £71,000 when the duty is 15 per cent. on the estate. There are several exemptions including (1) estates of £1,000 value and under ; (2) charitable, religious, scientific, or educational bequests ; (3) estates of persons dying on active service ; (4) concessions where the estate passes to widow, children or grand-children of deceased ; duty in such cases being two-thirds of the full rate.

#### ENTERTAINMENT TAX ACT 1916-18.

#### ENTERTAINMENT TAX ASSESSMENT ACT (1916).

This Act provides that there shall be, on a date fixed by proclamation, levied and paid on all payments for entry or admission to any entertainment, a tax at such rate as may be declared by Parliament. No person can be admitted to an entertainment except holding a ticket stamped with a stamp denoting that the proper entertainment tax has been paid or in special cases through an approved barrier, or by means of a mechanical contrivance which can automatically register the number of persons admitted. But the ticket and barrier system may be dispensed with if the proprietor of an entertainment has made arrangements with the commissioner to furnish returns of the money paid or taken for

admission, and has given security for payment of the tax. The following entertainments are exempt from taxation :—(1) Where the entertainment is for philanthropic, religious, or charitable purposes and where the whole of the takings are so applied without any charge or deduction for expenses ; (2) where the entertainment is of a wholly educational character ; and (3) where it is intended for the amusement of children and the charge should not exceed 6d. each.

Sub-section 12 (a) and section 13.

The first entertainment tax was fixed on the following basis, viz. :—Where the rate of admission exceeded 6d. up to 1/-, the tax was 1d. per head ; where the rate of admission exceeded 1/-, the tax for 1/- was 1d. and for every 6d. exceeding 1/- equal to  $\frac{1}{2}$ d.

By the Entertainment Tax (1918) the rates were altered to read as follows :—Not exceeding 1/- (excepting payment not exceeding 3d. for admission on Saturdays between the hours of 12 o'clock noon and 6 o'clock in the afternoon, of children apparently under the age of 12 years) equal to 1d. ; exceeding 1/- equal to 1d. for the first 1/- and  $\frac{1}{2}$ d. for every 6d. over 1/-.

#### WAR-TIME PROFITS TAX 1917.

#### WAR-TIME PROFITS TAX 1918.

#### WAR-TIME PROFITS TAX ASSESSMENT ACT 1917.

There shall be levied and paid on all war-time profits from certain defined trades, callings, and businesses, arising after 30th June, 1915, a war-time profits tax at such rate as Parliament may provide. The Act defines “ a pre-war standard of profits,” and “ an accounting period,” and declares that the profits of a pre-war year shall be computed on the same principles and subject to the same provisions as the profits of an accounting period. The war-time profits arising in any financial year is calculated as follows :—

(a) By ascertaining the monthly averages of the profit or loss arising in the accounting periods ending and beginning in the financial year.

(b) By multiplying the respective monthly averages of profit or loss of each of such accounting periods by the number of the months of the respective accounting periods falling within the financial year.



(c) By adding the amounts of the profit, or deducting the amount of the loss from the amount of the profit as the case may be and deducting from the sum so obtained the pre-war standard of profit as defined for the purposes of the Act.

(d) By deducting from the sum remaining in paragraph (c) the following (if any)—

(a) In the case of a business in which the pre-war standard of profit does not exceed £500, deduct £200.

(b) In all other cases where the sum remaining under paragraph (c)—

(i.) does not exceed £200, deduct the total sum.

(ii.) exceeds £200, deduct £200, less certain specified sums.

The profits arising from any business are separately determined on the same principles as profits and gains of the business are, or would be determined for the purpose of the Commonwealth income tax subject to certain modifications.

The following institutions, businesses, and persons are exempt, viz. :—

- (1) Municipal corporations, friendly societies, religious, charitable, and educational bodies, and wholly mutual life insurance societies.
- (2) Agricultural, fruit-growing, dairy, pig, and poultry industries, co-operative food supply companies.
- (3) Offices or employments from which salary or wages or emolument is derived.
- (4) Professions dependent upon personal qualifications requiring little capital.
- (5) Gold-mining.
- (6) Mining businesses specified by proclamation.
- (7) Ship-building contracts made with the Commonwealth Government since 4th August, 1914, and before the declaration of peace.

- (8) Businesses commenced since the declaration of war, deriving profits from the recovery from waste manufacture products of materials used in the production of munitions of war; or for the purposes of mining for any rare metal used for the manufacture of munitions and disposed of to the Imperial Government.
- (9) Persons being residents of Australia who are on active service outside Australia with the naval or military forces of the Allied Powers, and who are interested in businesses to which the Act applies, provided that before they went to the war they devoted the whole or greater part of their time to their businesses.
- (10) Commission agencies where little or no capital expenditure is involved.
- (11) Raising and sale of stud stock up to £2,000.

The war-time profits tax is imposed on the war-time profits at the following rates :—(a) On the war-time profits arising in the financial year ending 30th June, 1917 = 50 per cent. of these profits ; (b) On the war-time profits arising in each succeeding financial year = 75 per cent. of these profits.

### § 48 "TAXATION."

#### Revenue from Taxation.

The following tables compiled from the budget papers (June, 1918), show the revenue received from direct and indirect taxation during the last four years and the estimated revenue for 1918-1919 :—

#### Direct Taxation.

—	1914-15.	1915-16.	1916-17.	1917-18.	1918-19. estimated.
Land Tax ..	£1,953,696	£2,040,436	£2,121,952	£2,123,775	£2,000,000
Income Tax ..	—	£3,932,775	£5,621,950	£7,385,543	£7,400,000
Entertainment Tax ..	—	—	£110,682	£245,890	£205,000
Estate (Succession) Tax ..	£39,646	£626,215	£1,062,168	£943,232	£750,000
War-time Profits Tax ..	—	—	—	£680,003	£1,800,000
Total ..	£1,993,342	£6,599,426	£8,916,752	£11,378,448	£12,155,000

**Indirect Taxation.**

—	1914-15.	1915-16.	1916-17.	1917-18.	1918-19 estimate
A. Customs duties on imported goods	£12,105,698	£13,610,684	£12,373,664	£9,487,538	£8,310,500
B. Excise duties on goods produced in Australia ..	£14,877,254	£16,934,103	£15,610,287	£13,225,295	£12,050,000
Total ..	£26,982,952	£30,544,787	£27,983,951	£22,712,833	£20,360,500

**Meaning of.**

“The primary meaning of taxation is raising money for the purposes of Government by means of contributions from individual persons. The power to tax necessarily involves the power to select the subjects of taxation, viz. : persons or things. In the case of things the differentiation or selection is, in practice, usually made by reference to objective facts or attributes of the subject matter so that all persons or things possessing those attributes are liable to the tax. The circumstance that goods come from abroad or from a particular foreign country, or that particular processes or persons have been employed in their production, or that they possess certain ingredients, are instances of attributes which have been chosen for the purpose of differentiation. In a State possessing plenary powers of legislation any condition whatever may be imposed as a basis of selection for taxation purposes, and it is immaterial whether the differentiation should properly be regarded as an exercise of the power of taxation or of some other power. But where the competency of Parliament is, as in the Commonwealth, limited to specific matters it is necessary to inquire whether an attempted exercise of the power of legislation falls within some one or more of the thirty-nine powers enumerated in the Constitution. In interpreting the grant it must be considered not only with reference to other separate and independent grants such as the power to regulate external and interstate trade and commerce, but also with reference to the powers reserved to the States. A Federal law must not encroach on State domains. The regulation of the conditions of labour is a matter relating to the internal affairs of the States and is therefore reserved to the States and denied to the Commonwealth.” *Per GRIFFITH, C.J. in The King v. Barger*, (1908) 6 C.L.R., at p. 67-69.

**Indirect Effect of Taxes.**

The fact that taxation may produce indirect consequences was, as pointed out by the Chief Justice, fully recognized by the framers of the Constitution. They moreover saw that those indirect consequences would not, in the nature of things, be uniform throughout the vast area of the Australian Commonwealth, extending over 32 parallels of latitude and 40 degrees of longitude. The varying conditions of climate—tropical, sub-tropical and temperate and of locality—near or at great distances from the seaboard—made an effectual discrimination for many purposes between the several portions of the Commonwealth. Lest, however, the Parliament should desire to bring about equality in the incidence of the burden of taxation or what has been called an “equality of sacrifice” by discriminating between such different portions they were expressly prohibited from doing so. The words of section 51 (II.) “Taxation, but so as not to discriminate between States or parts of States” recognize the fact that nature has already discriminated and prescribed that no attempt shall be made to alter the effect of that natural discrimination. So in section 51 (III.):—“Bounties on the production or export of goods, but so that such bounties shall be uniform throughout the Commonwealth” the Parliament is precluded from attempting to equalize the conditions which nature has made unequal. Again, by section 88, it is prescribed that “uniform duties of customs” shall be imposed within two years. The inequality of the indirect effect of customs duties in different parts of the Commonwealth is obvious to all persons acquainted with its conditions but any attempt to correct this inequality is forbidden by the Constitution. *Per GRIFFITH, C.J. in The King v. Barger, (1908), at pp. 69-70.*

**Mode of Exercising the Taxing Power.**

Whilst the Commonwealth taxing power is unlimited with respect to subject matter (except the property and instrumentalities of a State), the Constitution has imposed certain restrictions in the mode and manner in which it may be legally exercised. In section 51 (II.) it is provided that there must be no discrimination between States; in section 88 that duties of customs shall be uniform, and in section 99, that no preference shall be given to one State over another State. See *supra* p. 43.

In section 55 it is enacted that laws imposing taxation shall deal only with the imposition of taxation, and laws imposing taxa-

tion (except laws imposing duties of customs and excise) shall deal with one subject of taxation only. Translated into ordinary language these rules mean simply "one tax, one Act" and "a tax and nothing but a tax in one Act." A law making a tax must be contained in one Act and nothing else must be in that Act. The means of collecting the tax and the penalty for not paying the tax must be in a separate Act. In Federal practice a tax is contained in one measure, whilst the machinery provisions for its interpretation, enforcement and prevention of evasion are placed in a separate Act generally called assessment, administration or machinery Act. Hence there is the Customs Tariff Act and the Customs Administration Act; the Excise Tariff Act and the Excise Machinery Act; the Land Tax Act and the Land Tax Assessment Act; the Income Tax Act and the Income Tax Assessment Act; the Entertainment Tax Act and the Entertainment Tax Assessment Act; the War-time Profits Act and the War-time Tax Assessment Act.

The reason for this separation is that the Senate is not permitted to amend a proposed law imposing taxation but it can amend a machinery, administration or assessment Act: Constitution, section 53. In order to prevent what was commonly known in parliamentary practice as "tacking" or mixing taxation with other matters so as to restrict the Senate's right of amendment, the Constitution provided that a Tax Bill shall deal with a tax only which may be passed or rejected, but not amended by the Senate; that a tax bill shall not be associated with machinery, collection or penal legislation, with respect to which the Senate has equal powers of amendment with those of the House of Representatives. The Senate could not amend the Land Tax Act but it is not prevented from altering the Land Tax Assessment Act which does not impose a tax but merely deals with matters incidental to the tax. The tax Act imposes a burden on the people; the assessment Act merely prescribes the method and principles of application of the tax; one determines the tax and the amount of the tax and its subject matter; the other provides the legal procedure by which the money is raised and paid into the Treasury. See Notes to section 55; *Stephens v. Abrahams* (No. 2), (1903) 29 V.L.R., 229; *Osborne v. The Commonwealth*, (1911) 12 C.L.R., 321.

### **Limitation of the Taxing Power.**

The limitation of the power of taxation is to be found, not only in the express words of section 51 (II.) and sections 88 and 99,

but also in other parts of the Constitution. The grant of power of taxation which is in some respects an independent power, must be so construed as to be not inconsistent with the other provisions of that instrument and necessary implications. If this contention be rejected it would mean that the power of taxation could be used as an over-riding power such as would enable the Parliament to invade any region of possible State legislation, although it is impliedly forbidden by legislation to enter it, and this by the simple process of making liability to taxation depend upon matters within those regions.

### **Ambit of the Taxing Power.**

Taxation includes customs duties ; but power to impose and collect such duties also comes within the scope of " trade and commerce with other countries " : *Attorney-General of New South Wales v. Collector of Customs New South Wales*, 5 C.L.R., at pp. 829, 834, 841, 853 ; see *Colonial Sugar Refining Co. v. Irving*, (1903) Q.S.R., at p. 271. In addition to the express limitation and prohibitions of the Constitution, other limitations have been deduced by judicial interpretation from the scheme of the Constitution taken as a whole.

It does not follow that, because an Act purports to be a taxing Act, it is therefore a constitutional exercise of the power of taxation. The Court will look at the substance, not at the form ; and if it finds, on the face of the Act, that it is not really a taxing Act, but an attempt to regulate the domestic affairs of the States, it will declare it to be *ultra vires* and void. The only question is whether the Act is within the ambit of the power.

The Excise Tariff Act 1906 purported to impose a duty of excise on certain agricultural machinery. But it exempted goods manufactured under conditions favourable as to the remuneration of labour. In *The King v. Barger*, 6 C.L.R., 41, this Act was held by the High Court (GRIFFITH, C.J., BARTON and O'CONNOR, JJ. ; ISAACS and HIGGINS, JJ. dissenting) to be *ultra vires*, on the main ground that it was, on its face, not a taxing Act, but an Act to regulate the conditions of labour and manufacture. The Chief Justice (Sir SAMUEL GRIFFITH) delivering the judgment of himself and BARTON and O'CONNOR, JJ., after declaring that, in determining the question of validity, regard must be had to the substance rather than the literal form of the Act, said that in a Federal State it might

not be within the competence of the taxing authority to interfere directly with prices or wages, but the circumstance that a tax affects those matters indirectly is irrelevant to the question of competence to impose the tax. Again, the motive which actuates the Legislature, and the ultimate end desired to be attained, are equally irrelevant. A Statute is only a means to an end, and its validity depends upon whether the Legislature is or is not authorized to enact the particular provisions in question, entirely without regard to their ultimate indirect consequences.

“Taxation,” said the Chief Justice (Sir SAMUEL GRIFFITH), “differs from exaction in that the obligation to contribute depends upon prescribed differentiations of the persons from whom, or the things in respect of which, the contribution is to be made. The power to tax necessarily involves the power to select the subjects of taxation.

“But where the competency of Parliament is limited, as in a Federal State, to specific matters, it is material, and indeed necessary, to inquire whether an attempted exercise of the power of legislation falls within some one or more of the enumerated powers. In the present case the only relevant power is taxation.

“The grant of the power of taxation is a separate and independent grant. This is the accepted law in the United States. In interpreting the grant it must be considered not only with reference to other separate and independent grants, such as the power to regulate external and inter-State trade and commerce, but also with reference to the powers reserved to the States.

“It was not contested in argument that regulation of the conditions of labour is a matter relating to the internal affairs of the States, and is therefore reserved to the States and denied to the Commonwealth, except so far as it can be brought within one of the thirty-nine powers enumerated in section 51.

“We are thus led to the conclusion that the power of taxation, whatever it may include, was intended to be something entirely distinct from a power to directly regulate the domestic affairs of the States which is denied to the Parliament”: 6 C.L.R., at pp. 66-9.

“The power of taxation is not an over-riding power, which would enable the Parliament to invade any region of taxation, although it is impliedly forbidden to enter it, and this by the simple

process of making liability to the taxation depend upon matters within those regions. . . . *Prima facie*, the selection of a particular class of goods for taxation by a method which makes the liability to taxation dependent upon conditions to be observed in the industry in which they are produced is as much an attempt to regulate those conditions as if the regulation were made by direct enactment": 6 C.L.R., at pp. 71-73.

Mr. Justice ISAACS and Mr. Justice HIGGINS (dissenting) were of opinion that the taxing power was plenary and unlimited except as expressed in the Constitution. They held that Commonwealth powers were not to be limited by first assuming the extent of the State powers; and that the reserved powers of the States were those remaining after full effect had been given to the powers granted to the Commonwealth, and could not control the extent of the Commonwealth powers so granted. They thought that the Act should be construed according to its plain language as a taxing Act, and that it was a valid exercise of the taxation powers.

#### Land Taxation and Land Settlement Policy.

The limits of the taxing power of the Commonwealth and whether a taxing Act may be void for its indirect consequences not contemplated by the Constitution, were questions considered in the case of *Osborne v. The Commonwealth*, (1911) 12 C.L.R., 321.

The Land Tax Act (1910) and the Land Tax Assessment Act (1910), were in that case impeached on the ground (1) that they were not in substance an exercise of the taxing powers of the Commonwealth, but an attempt to regulate the holding of land in the Commonwealth, which, it was contended, is *extra vires* of the Parliament. (2) That the real purpose of the so-called taxation is not so much to raise revenue as to prevent the holding of large quantities of land by a single person. The rule in *Barger's Case* was relied on in support of the attack. The Court, however, was unanimous in upholding the validity of both Acts.

The Chief Justice (Sir SAMUEL GRIFFITH) said:—"As was pointed out by this Court in *The King v. Barger*, 6 C.L.R., 41, although it is a frequent result of taxation to bring about indirect consequences which could not practicably, or could not so easily, be brought about by other means, yet the circumstance that taxation has such a result is irrelevant to the question of the competence



to impose the tax. In my opinion these Acts are in substance, as well as in form Acts imposing taxation, although there may be some provisions which may be open to objection upon other grounds. That objection therefore fails."

Mr. Justice BARTON said :—" Assuming that the taxation which it imposes is drastic, as it is alleged to be, still it is not the function of the Court to say that drastic taxation of landed interest will prevent residents from owning large areas, or prevent landholders from residing out of Australia, or prevent absentees from holding land within the Commonwealth. Nor is it our function to say what degree of inducement to abstain from doing these things amounts to a prevention of the doing of them. The alleged objects are not to be collected from the terms of this legislation. Even assuming that such designs existed, they would not alter the construction of an Act or make it less an exercise of the taxing power. They may be the motive or even the ultimate object. We have not to do with either of these things. The reasoning of the Supreme Court of the United States in *McCray v. United States*, 195 U.S., 27, is cogent upon this subject, and the case itself is very much in point. The conclusion drawn is thus expressed, in words which I venture to adopt : 195 U.S., 27, at p. 56 :—" The often quoted statement of Chief Justice MARSHALL in *M'Culloch v. Maryland*, 4 Wheat., 316, that the power to tax is the power to destroy, affords no support whatever to the proposition that where there is a lawful power to impose a tax its imposition may be treated as without the power because of the destructive effect of the exertion of the authority.' Other objections are taken by the plaintiff to the legislation as a whole on the ground of its usurpation of State powers. So far as these involve the scope and purpose of both or either of the Acts. I am of opinion that they are covered by what I have already said."

Mr. Justice O'CONNOR said :—" In *The King v. Barger*, 6 C.L.R., 41, the Statute under consideration, whatever may have been its form, was not in its nature and substance an Act imposing taxation. But in the Acts now before us I can see nothing to suggest that they are not taxing Acts. Their whole plan, the object of all their provisions, is plainly directed to the imposition of a graduated tax on the unimproved value of land. The principles to be applied in considering such a ground of invalidity are laid down in *Barger's Case*, 6 C.L.R., 41 ; it is unnecessary to repeat them here. It is sufficient, I think, to say that the effect and consequences of an

Act, even the motives of the Legislature in passing it, are immaterial, if the Act itself, according to the fair construction of its provisions, is an exercise of the power conferred."

The distinction between *Barger's Case* and *Osborne's Case* is that in the former the Court found that the Excise Act was, on its face, not a taxing Act; in the latter, the Court found that the land tax Act was, on its face, a taxing Act. In both cases, the motive and purpose of the Legislature, and the indirect effects of the impost, were held to be irrelevant.

### Taxing Shareholders in Land Companies.

The Land Tax Act, section 39, provides that all land owned by a company shall be deemed to be owned by the shareholders of the company as joint owners in the proportions of their interests in the paid up capital of the company, with the same consequences as to liability to taxation in respect of their respective interests as in other cases of joint ownership.

In 1912 a resident of New South Wales, being an owner of shares in certain land investment companies was assessed for land tax to the amount of £121/1/7 in respect of lands held by him in severalty and in respect of his shares in special land companies. He objected to the assessment and appealed to the High Court: *Morgan v. Deputy Federal Commissioner of Land Tax*, (1912) 15 C.L.R., 661. On his behalf it was argued that the Commonwealth Parliament had no power under the guise of a land tax to impose a tax upon a man in respect of land in which he had no interest. A thing named as a tax was not a tax if it was imposed on a man in respect of a subject matter in which he had no interest and over which he had no control. The decision in *Osborne v. The Commonwealth* did not imply anything to the contrary. For the Crown it was contended that the Land Tax Assessment Act 1910-11 deals directly with the imposition of land tax upon persons who have an interest in land. The Parliament has chosen, as the *discrimen* between persons who are to be taxed and those who are not, an interest in land—not using the word "interest" in its technical sense. The Parliament is not bound to restrict itself to legal or equitable interests in land, but they are bound not to include in the persons taxed those whose relation to land is fantastic or so unreal as to render the so-called tax an exaction of money from them under the guise of a land tax.

The High Court held that the members of a company owning land are in substance the beneficial owners of the land in proportion to their interests in the paid up capital of the company ; that in the nature of things, apart from technical questions of nomenclature and conventional legislative rules, the members of a company owning land are the beneficial owners of it, and that the Federal Parliament was entitled to treat the members of a company as the persons beneficially interested in the land owned by it, and to impose on them the liability to pay the tax made payable in respect of it.

The Chief Justice (Sir SAMUEL GRIFFITH) said :—

“ In my opinion, the Federal Parliament in selecting subjects of taxation is entitled to take things as it finds them *in rerum natura*, irrespective of any positive laws of the States prescribing rules to be observed with regard to the acquisition or devolution of formal title to property, or the institution of judicial proceedings with respect to it. I think, therefore, that when Parliament has determined upon a subject matter of taxation it is entitled to enact that any person who has a beneficial interest in that subject matter—using the term ‘ beneficial ’ in its widest sense—shall be liable to pay the tax ” : 15 C.L.R., at p. 666.

### **Husband and Wife Joint Liability.**

The Land Tax Assessment Act (1910), section 36 (2) provides as follows :—Where (a) a husband has directly or indirectly transferred land to or in trust for his wife, or (b) a wife has directly or indirectly transferred land to or in trust for her husband (they not being judicially separated), the husband and wife shall, unless the Commissioner is satisfied that the transfer was not for the purpose of evading land tax, be deemed to be joint owners of all the land owned by either of them. Section 38 (1) enacts that “ joint owners of land shall be assessed and liable for land tax in accordance with the provisions of ” that section, and by sub-section 2 that they shall be jointly assessed and liable “ in respect of the land ” as if it were owned by a single person.

In May, 1911, Mr. A. WATERHOUSE, (South Australia), transferred a piece of land to his wife, who was already the owner of other land, for the consideration of £13,000, of which £8,000 was paid to him in cash from the wife’s money. The Deputy Commissioner

sought to apply the provisions of section 36 on the ground that he was not satisfied that transfer was not made for the purpose of evading land tax. Mr. Waterhouse and his wife appealed to the High Court on the ground that the section was invalid as not being within the powers conferred upon the Parliament by the Constitution. It was objected that the section, if valid, operates not as imposing land tax but as imposing a liability upon one person to pay another's debt, and that such an imposition is not within the powers of the Parliament enumerated in the Constitution. Even if it be conceded that Parliament may under the general power of "taxation" impose a pecuniary liability upon any person for any cause it thinks fit, irrespective of the ownership of property, then, it was said, the subject of taxation in such a case was the person taxed, and not property or its ownership. So, in the present case, it was said, the subject matter of taxation of a wife in respect of her husband's property or of a husband in respect of a wife's property was not the same subject matter as the taxation of land. If, then, section 36 (2) imposed taxation, the Land Tax Act itself, No. 21 of 1910, which incorporates No. 22, would be invalid as contravening the second provision of section 55 of the Constitution which provides that laws imposing taxation, except laws imposing duties of customs and excise, shall deal with one subject of taxation only.

The Chief Justice (Sir SAMUEL GRIFFITH) in delivering the unanimous judgment of the Court, said :—"The provision now attacked cannot be supported on the ground that it is within the general power to impose taxation in respect of subject matters other than land. It was contended for the Commissioner that husband and wife are in law and in fact one person, and that the Parliament, acting on this view, can impose on either an obligation to pay taxes due by the other. The fundamental proposition is contrary to the fact, and no argument can be based on it. In considering the question of the validity of a Federal Act the Court has regard to the substance of the matter. In my judgment, section 36 is in substance an attempt to impose a pecuniary liability as a consequence of a transfer of land by a husband to his wife, or by a wife to her husband, which is *pro tanto* imposing a restraint upon such dealings, and the question is whether the Parliament has power to do so. The relations of husband and wife, and the conditions of the transfer of land, as well between them as between them and other persons,

are matters which, by the Constitution, are left to the States, and with which the Parliament has no authority to interfere. It was next sought to support the section as a provision incidental to the collection of land tax, that is, incidental to the prevention of evasion of the tax—in other words, that it is in the nature of a penalty. But the penalty or obligation is not made dependent upon any evasion or attempted evasion of the Act, but upon the mere fact of transfer, which is a lawful act, and which the Parliament has no power to declare unlawful. The fact that the Commissioner has a dispensing power does not alter the plain construction of the words. It is hardly necessary to point out that a *bona fide* alienation of land for the purpose of escaping the liability to taxation incident to its ownership is not an evasion of land tax. This argument, therefore, does not help the respondent. There is a second fatal objection to the validity of section 36. The first part of section 55 of the Constitution enacts that ‘laws imposing taxation shall deal only with the imposition of taxation, and any provision therein dealing with any other matter shall be of no effect.’ The two Acts, Nos. 21 and 22 are, together, an Act imposing taxation. Section 36, as we held in *Osborne’s Case*, is not a provision imposing taxation upon land, but a provision that persons not the owners of land shall be liable to pay land tax imposed upon owners, which is a provision dealing with a matter other than taxation, and is therefore of no effect. Even apart from section 55 of the Constitution it is not, in my judgment, within the competence of Parliament, having imposed a tax upon the owners of land, to declare that persons who are not in any sense owners shall be deemed to be owners for the purpose of payment of the tax. I cannot find in the Constitution any power to declare that the true shall be regarded as false, or the false regarded as true, except for the limited purpose of definition of a word or phrase which the Parliament uses in dealing with a subject matter wholly within its competence. For both these reasons I am of opinion that section 36 is invalid. It is not necessary to answer the other questions submitted in the case.” *Per GRIFFITH, C.J. in Waterhouse and Wife v. Deputy Commissioner of Land Tax (South Australia)*, (1914) 17 C.L.R., at p. 671.

Mr. Justice BARTON said :—“The first duty of the Court is to construe section 36 (2) by its actual terms, having in view the fact that when it enacts that the husband and wife shall in the circumstances stated be deemed to be joint owners the consequence plainly

intended is that they "shall be assessed and liable for land tax in accordance with the provisions" of section 38. There cannot be a doubt, therefore, that the intention of section 36 (2) is that the parties to the transfer shall be assessed as if they were in truth joint owners, with the result that they are to pay land tax as such. The Legislature, if we attribute to it, as we should, the belief that it was acting within the powers, must have been of opinion that the persons concerned could be validly brought within the area of land taxation by this statutory fiction. If its estimate of its powers was a mistaken one, that affords no reason to construe the provision as if it meant something different from a statement of intention as clear as words can make it. The result, then, of such a transfer as is mentioned in the section is to be a land tax, which is to fall upon the parties to the transfer as if each owned all the other person's land as well as his or her own. Innocence is no safeguard, and the liability automatically ensues unless the Commissioner intervenes, and in the absence of such intervention it must follow a transfer which is entirely lawful. The subject matter of taxation in section 36 is 'still land, and only land,' as we said of it in the case just cited. Neither of these Acts, therefore, can be said to offend against the second paragraph of section 55. But that does not end the matter. Section 36, no doubt, is an attempt to bring certain persons, in a certain event, within the area of taxation. Still, if an effective tax at all, it would be a land tax. But to be effective as a land tax it must be imposed in respect of actual ownership. Section 10 of the Assessment Act makes it clear that the tax imposed by the other Act is to be 'levied and paid upon the unimproved value of all lands which are owned by taxpayers' and not exempted. The *raison d'être* of the tax is the ownership of land. But the section is an attempt to impose the tax on persons who are not owners, by saying they shall be 'deemed to be' owners. To say that a person shall be deemed to be the owner of land does not vest the ownership in him. The Legislature may, no doubt, have mistakenly thought that it did, and that the provision was therefore consistent with section 10. The attempted tax, then, fails as a tax because it lacks the one essential condition. But, not being a land tax, it plainly intends, even if the motive be the keeping up of the revenue, to restrict the transfer of land in certain cases. This the Commonwealth has no constitutional power to do. In that aspect the provision is invalid." *Per* BARTON, J. in *Waterhouse and Wife v.*

*Deputy Commissioner of Land Tax (South Australia)*, (1914) 17 C.L.R., at pp. 671-674.

Mr. Justice ISAACS said :—" The view I take of the section is this. It was intended as an incidental provision—incidental, that is, to the land tax already enacted by Act No. 21. The Legislature, I gather, intended to make a provision to safeguard it by ensuring that land really owned jointly by husband and wife, though nominally standing in the separate name of either, should be taxed jointly according to the fact. And, recognizing the difficulty of establishing the reality, an arbitrary rule of evidence was devised, namely, that if a husband or wife were found transferring land to the other, or in trust for the other, that should be conclusive evidence that all the land nominally held in severalty was really held jointly and subject to the tax already imposed. No doubt the legislature has always enormous incidental powers of enacting evidentiary provisions. The Federal Parliament has, in relation to the subjects with which it deals, equal powers, in this respect, with any other Legislature, provided the matter is really incidental to the main power. The matter has been reasoned out in several American cases, and I think the reasoning satisfactory. The use of the word 'deemed' is a common legislative expedient to safeguard and enforce enactments, by making certain facts conclusive evidence. In this case as by the proper construction of the Statute, the Legislature has excluded all idea of acting upon any power but that of enacting a land tax—we are, I think, restricted to the single enquiry whether section 36 is really incidental to such a tax. In my opinion it is not, because the fiction it creates, namely, that the given person is to be deemed owner of certain land not in his name, is accompanied by an acknowledgment on the very face of the section itself, that the person in question has no interest whatever in the land." *Per* ISAACS, J. in *id.* 17 C.L.R., at pp. 677-678.

GAVAN DUFFY and RICH, JJ. said :—" All the judges who took part in the decision in *Osborne v. The Commonwealth* expressed the opinion that the Land Tax Act 1910 incorporating the Land Tax Assessment Act 1910 does not deal with any subject of taxation other than land. It cannot, therefore, be said that those Acts are, or any section of them is, bad under the second part of section 55 of the Constitution as dealing with more than one subject of taxation. The result is that the Legislature must be taken to have made an attempt to levy a land tax in respect of persons having no interest

in the land, and the question is whether such an attempted exercise of power is valid. It seems to have been assumed by all the Judges who took part in the decision in *Morgan v. Deputy Federal Commissioner of Land Tax, New South Wales*, that such an enactment would be unlawful, because not warranted by the gift of legislative power in the Constitution. Both the arguments and judgments in *Morgan's Case* are based on the hypothesis that the Commonwealth Parliament has no power to tax a person in respect of land in which he has no beneficial interest. Indeed, in view of the prior decision in *Osborne's Case* no argument could have arisen except on that hypothesis. We think, accordingly, that the provisions of section 36 (2) of the Land Tax Assessment Act 1910 are not obnoxious to the provisions of section 55 of the Constitution, but are invalid as being beyond the powers conferred by the Constitution on the Commonwealth Parliament, for any Commonwealth power must be based on a provision of the Constitution, and the onus of proving the existence of such a power lies on those who seek to rely on it." *Per* GAVAN DUFFY and RICH, JJ. in *Waterhouse and Wife v. Deputy Commissioner of Land Tax (South Australia)*, (1914) 17 C.L.R., at pp. 678-679.

### **Taxation of Crown Leaseholds.**

By the Land Tax Assessment Act (1910) the owner of a leasehold estate, under the laws of the State relating to the alienation or occupation of Crown lands not being perpetually leased, or a lease with a right of purchase, was not liable to assessment for taxation in respect of such estate. By the amending Act of 1914, the operation of the tax was extended so as to affect a large number of other Crown leaseholds, in many of which the lessee's use of the land is by law burdened with onerous conditions, which, in some cases deprive the lessee of the full beneficial use of the land leased. The constitutionality of this extension was impeached in the case of the *Attorney-General for Queensland v. The Attorney-General for the Commonwealth*, (1915) 20 C.L.R., 148. After the passing of the amending Act all leases from the Crown were to be treated as made after the commencement of the Act. Section 28, as amended by the same Act, provides that in such cases the unimproved value of a leasehold estate in land means the value of the amount (if any) by which  $4\frac{1}{2}$  per cent. of the unimproved value of land exceeds the rent reserved by the lease for the unexpired term, the excess being capitalized at the same rate. This was, on its face, an attempt to



define the value of the term created by the lease, which value is to be the subject of taxation. In every case of a lease the ownership of the land is divided between the lessor and the lessee. The value of the lessee's share in the total ownership is the value of the term. The residue represents the value of the reversion which remains in the lessor.

The objections raised in this case were that such taxation was repugnant to the Colonial Laws Validity Act 1865; that such tax as far as it imposed a tax upon the unimproved value of land granted by a State as a leasehold was not a law with respect to taxation within the province of the Commonwealth Parliament, but was in substance legislation with respect to the control and management of the waste lands of the Crown; that such tax was a tax upon the property of the State contrary to section 114 of the Constitution; that such tax was a tax upon the governmental functions or instrumentality of the State of Queensland. It was also objected that section 39 of the Act, so far as it purports to impose taxation upon shareholders of companies in respect of land owned by companies was invalid as not being a tax on land, but a tax on personal property, namely shares, and that, therefore, the Act offended against section 55 of the Constitution.

The whole of these objections were over-ruled and the validity of the tax was again affirmed. It was held that the subject of taxation was the interest of a lessee in the land; that such private interest could not in any relevant sense of the term be called property belonging to a State. The taxation impeached could not be regarded in any relevant sense as an interference with any of the legislative powers of the States. As regards the argument that the tax offends against provision of section 55 of the Constitution by dealing with more than one subject of taxation inasmuch as by sections 39-40, it imposed a tax upon members of a joint stock company in respect of land owned by the company, it was pointed out that this contention was expressly decided by the Court in the *Morgan Case*, 15 C.L.R., 661. The Court saw no reason for doubting the correctness of its decision in that case.

In delivering the judgment of the Court, the Chief Justice, referring to the assailed legislation, said:—"It appears to me to follow that the plain design and purpose of this enactment is that the lessee shall pay land tax upon, and according to, the value of his interest in the land, and that as such it forms a natural part of

a scheme of general land taxation. The objection therefore fails" : 20 C.L.R., at p. 161. The Privy Council refused to grant special leave to appeal : 22 C.L.R., 322.

### Colonial Laws Validity Act 1865.

In the case of the *Attorney-General of Queensland v. Attorney-General of the Commonwealth*, (1915) 20 C.L.R., at p. 519, the validity of the Commonwealth Land Tax Assessment Act 1912-14 was considered. It was contended that some of its provisions under which leasehold estates in Crown land are made liable to land tax were invalid under the Colonial Laws Validity Act 1865 (28 & 29 Vict. c. 69) on the ground that the provisions attacked are repugnant to laws of the Parliament of the United Kingdom (of which the Act 18 & 19 Vict. c. 54 may be taken as an instance). by which full powers of legislation with respect to waste lands of the Crown in the Australian Colonies were vested in the Legislatures of those Colonies. The High Court held that the Federal Constitution had not in any way qualified the powers of the State Legislatures with respect to the control of the waste lands of the Crown ; that such powers were complete and exclusive in the States, being expressly continued by section 107 of the Constitution ; that the repugnance if there were any was between the Land Tax Assessment Act and the Constitution of New South Wales (Imperial) and therefore the Colonial Laws Validity Act was quite irrelevant of the question. Mr. Justice HIGGINS, said :—" It is hard to conceive of any law of the Federal Parliament within its powers that would be ' repugnant ' to the Act 18 & 19 Vict. c. 54. The repugnancy must be between the Commonwealth law and the 18 & 19 Vict. c. 54—not between the Commonwealth law and the State Act. What does ' repugnant ' mean ? I am strongly inclined to think that no Colonial Act can be repugnant to an Act of Parliament of Great Britain unless it involve, either directly or ultimately, a contradictory proposition, probably, contradictory duties or contradictory rights. If the Federal Parliament, in pursuance of its power to acquire land, were to vest land in A., and the State Parliament were to say that it vests it in B., there would be no repugnancy within the Colonial Laws Validity Act, for the repugnancy would be between the Federal law and the State law, and under section 109 of the Constitution the Federal law prevails. By section 106, the Constitution of the State continued, but subject to the Federal Constitution" : 20 C.L.R., at p. 178.

**Customs Import Duties.**

“The customs law from this point of view is nothing more than an exercise of the power the Commonwealth possesses of regulating the manner and terms on which goods may be brought into the Commonwealth. For these reasons I am of opinion that the levying of duties of customs on importation is not the imposition of a tax upon State property within the primary and literal meaning of section 114 of the Constitution standing alone.” *Per GRIFFITH, C.J.* in the *Attorney-General of New South Wales v. Collector of Customs for New South Wales*, (1908) 5 C.L.R., at pp. 831-832.

“Is a customs duty a tax within the meaning of the Constitution, section 114”? In the broadest sense a tax it undoubtedly is, and if the words “tax” stood alone it would be impossible to deny its inclusion of customs duties as well as of a direct tax on property after incorporation in the general stock of the country. But the word “tax” and its plural “taxes” are not words of invariable signification indicating any exercise whatever of the power of taxation; they are not infrequently used to denote a particular species of imposition in contra-distinction to duties and to duties of various kinds. The word “taxation” when used to confer a governmental power carries the amplest meaning; but “tax” may or may not be as wide. The words must be looked at in relation to its surroundings, it must be considered with respect to the object of the clause in which it stands, and the results which would flow from one construction or the other; in short its meaning must, like any other word not of invariable signification found in a document, be ascertained by interpreting it by the light of the whole instrument. There are many Statutes in which “taxes” may be found differentiated from “duties.” “The mere use of a word,” said Mr. Justice ISAACS “not uncommonly employed in a limited sense, and indeed in connection with the word ‘property’ more often and more appropriately used in a limited sense, combined with the marked omission of the word ‘duties’ convinces me that customs duties are not within the object and intention of section 114.” *Per ISAACS, J.* in the *Attorney-General of New South Wales v. The Collector of Customs for New South Wales*, 5 C.L.R., at p. 851.

“But is a customs tax a tax on property as such”? The Customs Tariff 1902 speaks of “duties . . . on . . . goods.” and the expression is roughly accurate although probably if fully expressed it would be a tax on persons in respect of the importation

of goods ; just as a property tax is usually, though not necessarily, a tax on persons in respect of their property. The customs tax is a tax not on property as such, but on persons in respect of and on account of the movement of commerce known as the act of importation. There is a fundamental difference between taxing men for having property and taxing men for moving property—and, in particular for moving property into a country from overseas. When the Commonwealth imposes a customs duty the duty is not payable unless it be attempted to move the goods from London to Australia “ I prefer ” said Mr. Justice HIGGINS “ to base my judgment on this ground which I have stated. I cannot, confidently, take the ground that a customs duty cannot be a tax with the meaning of the word ‘ tax ’ in section 114. It is true, that ‘ duties of customs ’ and ‘ duties of excise ’ are the usual expressions ; but phraseology such as is used in section 55 shows that the Constitution treats the imposing of such duties as being the imposing of taxes.” *Per HIGGINS, J.*, 5 C.L.R., at pp. 854-855.

#### **Penal Taxation of Oleomargarine.**

The American Oleomargarine Act of 1886, as amended by the Act of 1902, imposed an excise tax of 10 cents per lb. on oleomargarine artificially coloured to resemble butter, and a tax of only one-fourth of a cent per lb. on oleomargarine not so coloured.

In support of the harvester excise duty in *The King v. Barger* the Commonwealth Attorney-General cited and placed reliance on the decisions of the Supreme Court of United States in the oleomargarine cases in which the Court upheld the validity of Congressional legislation imposing excise duties on the oleomargarine or imitation butter for the purpose of preventing oleomargarine being sold as butter. The constitutionality of this legislation was affirmed by the Supreme Court in 1904 in the case of *McCray v. United States*, 195 U.S., 27.

The appellant had been fined for having knowingly purchased for re-sale a 50 lb. package of oleomargarine artificially coloured to look like butter and having affixed revenue stamps at the rate of one-fourth of a cent per pound instead of ten cents per pound. He contended that the Act was repugnant to the Constitution. It was argued that the power to regulate the manufacture and sale of oleomargarine being solely reserved to the several States it followed that the Acts of Congress passed for the purpose of preventing the manufacture and sale of oleomargarine when artificially coloured

was void because it usurped the reserve power of the States and therefore exerted an authority not delegated to Congress by the Constitution. As the necessary operation and effect of the tax was to suppress the manufacture of artificially coloured oleomargarine and to aid the butter industry, therefore, it was submitted, the Act was void.

The Supreme Court held that this Act was, on its face, a taxing Act; that the alleged purpose or motive of Congress, was not to raise revenue but to suppress manufacture, did not concern the Court; and that the Court had no authority to declare a taxing Act void on the ground that Congress had abused its authority by levying a tax which was unwise or oppressive, or which might have the result of indirectly affecting subjects not within the powers delegated to Congress. This case was much discussed in *Barger's Case* and *Osborne's Case* (*supra*). See also *Patton v. Brady*, (1902) 184 U.S., 608; *Ex parte Kollock*, (1897) 165 U.S., 526.

Referring to the decision in *McCray v. United States*, the Chief Justice (Sir SAMUEL GRIFFITH) differentiated it from the harvester excise duty case as follows, he said:—"In this case the Act imposing a duty of excise upon oleomargarine goods, adulterated in a specific manner" was held valid although the tax was so large as to be in effect prohibitive of the adulteration. In that case objection was also taken to various detailed provisions of the Act as relating to matters of State concern. But they were all provisions of such a nature as are common in Acts relating to the collection of internal revenue being incidental to the prevention of evasions of the tax itself." *Per* GRIFFITH, C.J. in *The King v. Barger*, 6 C.L.R., at p. 67.

A strong point of difference between the American oleomargarine excise with the Australian harvester excise duty was that in the former case the classification was based on the inherent character, quality or description of the subject matter, viz., imitation butter colour, etc. That, of course, is a most common basis of differentiation in the levying of taxes. *Per* HIGGINS, J., 6 C.L.R., at p. 127.

### **Handling Taxable Goods.**

In the regulations for the manufacture and handling of goods which are subject to an internal revenue tax, Congress may make any reasonable regulation, which it considers necessary or advisable for effectually securing payment of the tax. It may prescribe the size and form of packages, and may prohibit the packing of excisable

goods with other goods: *Felsenheld v. United States*, (1901) 186 U.S., 126.

### Death and Succession Duties.

Subject to the limitations of the Constitution, the taxing power reaches every subject, and may be exercised at discretion. It extends to death duties and succession duties of all kinds: *Knowlton v. Moore*, (1900) 178 U.S., 41.

### State Instrumentalities when Immune.

In the American Courts municipalities, speaking generally have been treated as carrying on their public services as instrumentalities of the State which gives them corporative existence. The cases of *Meriwether v. Garrett*, 102 U.S., 472, and *United States v. Railroad Co.*, 17 Wall., 322, broadly lay down the principle that a municipal corporation is a portion of the governing power of the State, and that any attempt to control or interfere with its functions is an attempt to interfere and control the State itself. Until the case of the *South Carolina v. United States*, 199 U.S., 437, the Supreme Court held that there must be implied in the Constitution a prohibition against the exercise by the United States of control in any form over an instrumentality of the State Government. *Per* NELSON, J. in the *Collector v. Day*, 11 Wall., 17, at p. 127.

In the *South Carolina Case*, however, the Court held that the exemption of State agencies and instrumentalities from national taxation is limited to those which are of a strictly governmental character, and does not extend to those employed by the State in carrying on an ordinary private business. In that case the sale of intoxicating liquor was the business of which the State in the exercise of its governing power had taken charge. It was therefore held liable to Federal taxation.

Referring to that decision, GRIFFITH, C.J., said "I express no opinion upon the grave and difficult question of how far, if at all, the doctrines which have been laid down in the United States of America on this subject should be regarded as implicitly adopted by the Constitution of the Commonwealth. But as at present advised I see no serious reason for doubting that, if a municipal corporation chooses to engage in what has lately been called 'municipal trading,' and joins the ranks of employers in industries, it is liable to the same Federal laws as other employers engaged in the same industries. This limitation is, indeed, I think, generally

accepted in the United States (see *South Carolina v. United States*, 199 U.S., 437 and the decisions of the Supreme Courts of New York and Pennsylvania cited in that case)”: Per GRIFFITH, C.J. in the *Federated Engine-Drivers' and Firemen's Association v. Broken Hill Proprietary Ltd.*, (1911) 12 C.L.R., at p. 415. But see section 114 of the Constitution of the Commonwealth which prohibits the Commonwealth from taxing the property of a State.

In the *Municipalities Case* the Full High Court decided that such corporations were not immune from awards by the Commonwealth Arbitration Court: *The Argus*, 20th May 1919.

#### § 49. “BUT SO AS NOT TO DISCRIMINATE.”

##### **Discrimination.**

The Excise Tariff 1902, which was assented to on 26th July, 1902, imposed duties of excise as from 8th October, 1901. That was the date on which the resolutions for the imposition of customs and excise duties were submitted to and temporarily authorized by the House of Representatives. It laid an excise duty of £3 per ton on sugar manufactured in Australia; and was expressed to extend to such goods as were manufactured before the said 8th October, 1901, and which were at that date in bond or in the stock of the manufacturer or refiner, and on which no customs or excise duty under a State tariff had been paid before that date. The State customs and excise tariffs, though legally in force till the passing of the first uniform customs tariff on the 16th September, 1902, were not collected after the 8th October, 1901.

In 1903, before the Constitution of the High Court, the Colonial Sugar Refining Company brought an action in the Supreme Court of Queensland against the Collector of Customs in that State to recover money paid by way of sugar excise duty. On behalf of the Company it was contended that the Excise Act 1902 was void for discrimination between States. The suggested discrimination was based on the exemption of sugar which had paid customs duties under a State Tariff Act. Queensland sugar which on 8th October, 1901, remained in Queensland, or had been introduced into Western Australia, where there was no customs duty on sugar, had paid no State duty and was therefore liable to the Commonwealth excise duty of £3 a ton whilst Queensland sugar which had been entered for home consumption in New South Wales or Victoria, and which would, under the customs tariffs of those States have paid a duty of

£3 a ton in New South Wales and £6 a ton in Victoria, would be exempt from the Commonwealth excise. The Court held, however, that this was not a discrimination within the meaning of the section.

Sir SAMUEL GRIFFITH (then Chief Justice of Queensland), said, the exemption involved in one sense, an inequality between individuals, but it was not a discrimination between States. The difference was accidental. It was not a discrimination made by the Commonwealth Excise Act. The words of the Constitution, "but so as not to discriminate between States or parts of States," and "not to give preference to one State or any part thereof" meant State *qua* State or part of a State, that is to say, the discrimination to be unconstitutional must depend upon the geographical position, and not upon the accident of whether things happen to be found in one State or in another.

"I do not think," said the Chief Justice, "that we can have regard to the fact that, owing to the operation of the laws of the States, the incidence of taxation may be unequal in different States. If that were so, the power of the Federal Parliament would be limited by the laws of the States, and by the mode in which the States had exercised their powers of legislation. If the imposition of these duties leads to an inequality, it is not a defect in the federal law; it arises from the fact that the laws of the States were different, which is quite another thing": *Colonial Sugar Refining Co. Ltd. v. Irving*, 3 Q.S.R., at pp. 276-277.

This decision was affirmed by the Privy Council, in appeal, 1906 A.C., 360. In the course of their judgment their Lordships said:—"The rule laid down by the Act is a general one, applicable to all the States alike, and the fact that it operates unequally in the several States arises not from anything done by the Parliament, but from the inequality of the duties imposed by the States themselves."

### Differential Rates of Wages.

The Excise Tariff Act (1906) (No. 16) if otherwise valid, is invalid on the ground that it authorizes discrimination, and therefore discriminates, between States or parts of States within the meaning of section 51 (II.) of the Constitution, and authorizes the giving, and therefore gives, preference to one State or a part thereof over another State or a part thereof within the meaning of section 99 of the Constitution: *The King v. Barger*, (1908) 6 C.L.R., 42.



The Chief Justice (Sir SAMUEL GRIFFITH), delivering the judgment of himself and Justices BARTON and O'CONNOR, said :—

“ The words ‘ States or parts of States ’ must be read as synonymous with ‘ parts of the Commonwealth ’ or ‘ different localities within the Commonwealth. ’ The existing limits of the States are arbitrary, and it would be a strange thing if the Commonwealth Parliament could discriminate in a taxing Act between one locality and another, merely because such localities were not co-terminous with States or with parts of the same State. ” : 6 C.L.R., at p. 38.

After referring to the four categories of conditions as to remuneration of labour which would exempt goods from taxation under the Act, the judgments continues :—“ It is abundantly clear from these provisions that the Legislature not only purported to authorize the prescribing of conditions according to the circumstances of locality, but intended, and indeed prescribed, that discrimination according to locality might be made. Any other rule would be manifestly unjust. Yet this is the very thing which, so far as regards liability to taxation, is prohibited by the words under consideration. It was suggested that, though the Act thus authorizes discrimination between States and parts of States, it does not itself discriminate, since, it is said, the conditions actually prescribed by any or all of the specified authorities might in fact be identical throughout the Commonwealth. The Legislature may in some cases delegate the power of fixing the incidence of taxation : *Powell v. Apollo Candle Co.*, 10 A.C., 282, but it would be a strange thing to hold that, while it cannot itself discriminate between localities, it can, by delegation, confer power to make such discrimination ” : 6 C.L.R., at p. 80.

Mr. Justice ISAACS and Mr. Justice HIGGINS, dissenting, held that the Act did not authorize discrimination. Mr. Justice ISAACS suggested that where an Act discriminated between States or parts of States, it ought to be possible to point out the States or localities which it favoured. Mr. Justice HIGGINS considered that even if the Act did authorize discrimination, that would not invalidate the Act, since the discrimination was not a necessary result of the Act : though it might invalidate a discriminating order or award made under the Act : 6 C.L.R., at pp. 105-109, 130-132.

The decision in this case does not cast any doubt on the power of the Commonwealth Court of Conciliation and Arbitration to

make an award in settling a two State industrial dispute providing for different rates of wages in different localities, varying according to the different conditions of life and labour and the cost of living : *Federated Saw Mills Employees v. James Moore & Sons Ltd.*, (1909) 8 C.L.R., 465.

**Discrimination in United States.**

In *Knowlton v. Moore*, (1900) 178 U.S., 41, it was argued that an Act of Congress imposing succession duties was unconstitutional as not being "uniform throughout the United States," because it exempted bequests or shares below a certain value, because the rate of tax varied according to the relationship or non-relationship of the taker to the deceased, and because the rate of tax progressed with the amount of the interest taken. The Court held, however, that the constitutional provision related to purely geographical uniformity, and did not forbid progressive taxation, classification, or exemptions : 178 U.S., at pp. 83-110). See also *Hanover National Bank v. Moyses*, (1902) 186 U.S., 181.

51. (iii.) Bounties<sup>50</sup> on the production or export of goods, but so that such bounties shall be uniform<sup>51</sup> throughout the Commonwealth ;

**§ 50. " BOUNTIES."**

**LEGISLATION.**

**BOUNTIES ACT 1907.**

This was an Act to provide for the payment of bounties on the production of certain goods described in the first schedule as follows :

Bounty Goods.	Rates of Bounty.	Maximum Amount Paid in any year.
Cotton, Ginned — —	10% on market value	£6,000
Fibres—		
N.S. Flax .. ..	10% to	
Hemp, Jute .. ..	20% on market value	£23,000
Sisal Hemp .. ..		
Oil materials for manufacture of oil, Cottonseed, Linseed Flax Seed) .. ..	10% on market value	£6,000

Bounty Goods.	Rates of Bounty	Maximum Amount Paid in any Year.
Rice, Uncleaned .. ..	20s. per ton ..	£1,000
Rubber .. ..	10% on market value	£2,000
Coffee, Raw .. ..	1d. per lb. .. ..	£1,500
Tobacco Leaf for the manufacture of cigars, high grade	2d. per lb. .. ..	£4,000
Fish, Preserved .. ..	½d. per lb. .. ..	£10,000
Fruits—		
Dates (dried) .. ..	1d. per lb. .. ..	£1,000
Dried (except currants and raisins) or candied, and exported .. ..	10% on market value	£6,000
Combed wool or tops, exported	1d. per lb. to 1½d. per lb. ..	£10,000

Every grower or producer claiming bounty under the Act is required to prove to the satisfaction of the Minister that he has paid the minimum rate of wages prevailing in the place or district in which the goods are grown or produced. The sum of £339,000 was appropriated under this Act payable by instalments as prescribed in the schedule extending over a period of 15 years.

#### MANUFACTURERS ENCOURAGEMENT ACT 1908.

By this Act the sum of £180,000 was appropriated for the purpose of bounties on the production of the following goods :—

Description of Goods.	Rate of Bounty.
Pig iron made from Australian ore .. ..	12s per ton
Puddled bar iron made from Australian pig iron	12s. per ton
Steel made from Australian pig iron .. ..	12s. per ton
Galvanized sheet or plate iron or steel made from Australian ore .. ..	10% on value
Wire netting, not being prison made and being made from Australian ore or from wire manufactured in the United Kingdom.	
Wire made from Australian ore .. ..	10% on values
Iron and steel tubes or pipes (except rivetted or cast), not more than six inches internal diameter, made from Australian pig iron or steel .. ..	10% on value.

## SHALE OILS BOUNTIES ACT 1910.

By this Act there was appropriated the sum of £50,000 payable as bounties during a period of three years on the production of the following goods :—

Description of Goods.	Rate of Bounty.
Kerosene, the product of shale, having a flashing point of not lower than 73 degrees Fahrenheit, as determined by the "Abel Pensky" test apparatus in manner prescribed .. ..	2d. per gallon
Refined Paraffin Wax .. ..	2/6 per cwt.

## SHALE OIL BOUNTY ACT 1917.

There was, by this Act, made payable during the period of four years commencing the 1st September, 1917, as bounties for production in Australia of crude shale oil from mined kerosene shale, the sum of £270,000. The total amount of the bounty authorized to be paid in one year may not exceed the sum of £67,500. The rate of bounty payable in each year to each producer is 2½d. on each gallon produced up to 3,500,000 gallons, with a reduced rate for larger quantities.

## SUGAR BOUNTY ACTS 1903-1913.

The Sugar Bounty Act 1903 provided (in lieu of the rebate under the Excise Tariff 1902) for payment of a bounty until the end of the year 1906, to every grower of sugar cane or beet in the production of which white labour only had been employed.

The Sugar Bounty Act 1905 increased the rate of the bounty as follows viz.:—6/- per ton on sugar-cane giving 10% of sugar and on beet 60/- per ton on the actual sugar yielding contents of beet. The Act also extended the term of the operation of the bounty until the end of the year 1912, with successive reductions of one-third of the rate during the last two years of the term. The limitation as to time, and the provision for reduction, were repealed by the Sugar Bounty Act 1910. The Sugar Bounty Abolition Act 1912 (proclaimed to commence on 26th July, 1913) repealed the Sugar Bounty Acts—the excise duty on sugar being simultaneously abolished. A subsequent adjustment in connection with the termination of the bounty and excise was effected by the Sugar Bounty Act 1913 and the Excise Tariff 1913.

### SUGAR BOUNTY ACT 1913.

In order to meet the cases of producers of white-grown cane or beet who had not delivered their raw material for manufacture between 1st May and 26th July 1913 (date of proclamation of repeal of the Sugar Bounty Act) an Act was passed on the 30th October, 1913, extending the time within which such cane or beet could be delivered for manufacture and thus be entitled to bounty.

### WOOD PULP AND ROCK PHOSPHATE BOUNTIES ACT 1912.

There shall be payable during the period of five years from 1st January, 1913, as bounties or rewards for the manufacture or production in Australia of wood pulp and rock phosphate, the sum of £75,000 subject to the conditions prescribed. The bonus for wood pulp was 15% of its market value, and of rock phosphate 10% of its market value. The maximum amount which might be paid in any one year was fixed at £5,000. The payment of bounties on rock phosphate was afterwards extended for a period of 10 years

### APPLE BOUNTY ACT 1918.

This Act passed in June 1918, appropriated the sum of £12,000 to be distributed in bounties on export from Australia of evaporated apples, and sold to the British Government for delivery between the 1st April and 31st August 1918. The amount of the bounty in each case was to be 10 % of the value of the evaporated apples the value being taken at not exceeding 7d. per lb.

### IRON AND STEEL BOUNTY 1918.

This was an Act to provide for the payment of bounty on the manufacture, in Australia of black steel sheets and galvanized sheets. The Governor-General may authorize payment of bounties of these products according to the rates set out in the schedule, viz. :—

Black steel sheets, £1/10, - per ton, galvanized sheets, 10 - per ton, varying according to the freight on imports. The total amount of bounty authorized is not to exceed £200,000, payable by annual instalments, not exceeding the sum of £40,000. If the net profits of any person, firm or company, claiming bounty under the Act exceeds in any year 15 % on the capital employed in the business. the Minister may withhold so much of the bounty payable as will reduce the net profits for that year to 15 % on the capital employed in the business. The Minister may make application to the Presi-

dent of the Court of Conciliation and Arbitration, for a declaration as to what wages, and conditions of employment are fair and reasonable for labour employed in the manufacture of black steel sheets or galvanized sheets.

#### COMMONWEALTH EXPENDITURE IN BOUNTIES.

The following return, prepared for this work by the Commonwealth Treasury, shows the expenditure in bounties up to the end of the year 1917 :—

YEAR.	Sugar Bounty Act 1903/5/10/12.	Bounties Act 1907/12.	Iron Bounties Act 1914/15.	Manufactures Encouragement Act 1908/12.	Shale Oil Bounties 1910/17.
	£ s. d.	£ s. d.	£ s. d.	£ s. d.	£ s. d.
1902-3	60,826 11 7	..	..	..	..
1903-4	90,806 5 9	..	..	..	..
1904-5	121,408 12 6	..	..	..	..
1905-6	148,105 14 2	..	..	..	..
1906-7	328,209 10 3	..	..	..	..
1907-8	577,148 8 5	175 16 11	..	..	..
1908-9	477,089 19 11	2,633 10 8	..	3,648 9 4	..
1909-10	402,131 16 1	5,884 16 1	..	32,578 12 0	..
1910-11	630,762 7 11	10,266 13 0	..	29,427 3 11	1,472 19 7
1911-12	543,502 12 4	19,573 14 0	..	23,047 13 4	3,367 18 11
1912-13	370,125 6 8	14,411 10 9	..	18,097 16 10	3,759 3 11
1913-14	149,243 11 2	13,975 4 7	..	51,810 8 0	328 17 8
1914-15	3 10 3	8,477 17 7	19,808 0 11	15,072 1 6	..
1915-16	..	6,766 12 4	24,464 14 3	..	..
1916-17	174 3 7	2,994 18 8	11,453 17 7	..	..
1917-18	..	409 15 7	..	..	15,008 9 6
1918-19	..	..	..	..	14,372 3 3
	£3,899,538 10 7	£85,570 10 2	£55,726 12 9	£173,682 4 11	£38,309 12 10

The total expenditure shown in the above return is £4,252,827 11 3.

No money has been paid by way of bounty under the Wood Pulp and Rock Phosphate Act 1912-1917.

#### § 51. "UNIFORM THROUGHOUT THE COMMONWEALTH."

The Sugar Bounty Act 1905 (now repealed) discriminated between sugar produced from "white-grown" cane or beet, and sugar in the production of which coloured labour had been employed and on which no bounty could be claimed. The validity of this legislation was much discussed, but was never tested in the Courts. Does the principle of *The King v. Barger*, 6 C.L.R., 41, apply, and is such legislation void as an attempt to control methods of manufacture?

In this regard, an important distinction must be noted between a tax and a bounty. The tax in *Barger's Case* was held to be.

in reality, not a tax but a penalty for not paying "fair" wages. In the case of a bounty no similar distinction applies. A bounty is a bounty, whatever the conditions of its grant. A tax and a penalty may be different things, but their respective opposites are the same thing—a bounty or reward. So that a bounty is not less a bounty because it appears, on the face of the Act granting it, that its purpose is to control the process of production.

Again, the power of the Commonwealth Parliament is to make laws with respect to "bounties on the production or export of goods." A bounty on production is presumably for the purpose of encouraging or stimulating production; and it would appear that the Federal Parliament has the power to select not only the goods, the production of which it will encourage by means of bounties, but also the particular methods or conditions of production which it will so encourage. The States are forbidden, by section 90 of the Constitution, to stimulate production in this particular way, and therefore there is no reserve power of a State with which a Commonwealth bounty can conflict. In this view, a grant of bounties by the Commonwealth Parliament may be made upon any conditions, as to employment of labour or otherwise, which the Parliament chooses to impose—subject, of course, to the limitation that the bounty must be "uniform" throughout the Commonwealth."

This view has been adopted by the Parliament, not only in the Sugar Bounty Act 1905-1910, but also in the other Acts granting bounties, all of which contain conditions as to the payment of standard wages for labour employed in production.

In *The King v. Barger*, 6 C.L.R., at p. 70, the judgment of the majority of the High Court compared the words of limitation in this paragraph—"but so that such bounties shall be uniform throughout the Commonwealth"—with the words of limitation in the preceding paragraph (51 (II.))—"but so as not to discriminate between States or parts of States"—treating the two phrases as substantially identical. By these words, they said, "the Parliament is precluded from attempting to equalize the conditions which nature has made unequal."

Mr. Justice ISAACS, who dissented from the judgment of the majority, also referred to the question of discrimination as regards bounties, and the application of section 99 of the Constitution.

He said :—" I wish to add, having regard to some observations that fell from me during the argument on the subject of bounties, that I recognize, in view of this decision, it may be argued that even a Bounty Act would fall within the prohibition of section 99. I can understand the contention being presented that discrimination between two necessarily includes proference for one, and therefore an enactment in the terms of the proviso of the Excise Tariff Act 1906 would invalidate a Bounty Act equally with a taxing Act. Of course, I express no opinion on the subject, but, as a good deal was said during the progress of the case, I wish, in view of the present decision, to guard myself against being thought to have any opinion one way or the other with respect to bounties " : 6 C.L.R., at p. 111.

51. (iv.) Borrowing<sup>52</sup> money on the public credit of the Commonwealth ;

§ 52. " **BORROWING MONEY.**"

LEGISLATION.

THE COMMONWEALTH INSCRIBED STOCK ACT 1911-1916.

This legislation marks the beginning, small and unambitious in its way, of a system of Commonwealth borrowing, which subsequently assumed formidable dimensions. It was at first found to be a convenient method of borrowing and using public trust funds. It authorized the creation and issue of capital stock, called " Commonwealth Government Inscribed Stock," for raising loans authorized by any loan Act, and for paying such expenses of carrying the Act into effect as are declared by Order-in-Council to be properly payable out of capital. It provides for the establishment of registries in the Commonwealth and in London, the inscription and transfer of stock, the issue of stock certificates to bearer, and the creation of a stock redemption fund.

Section 44 (a), added in 1913, provided for the satisfaction of judgments obtained against the Commonwealth in the United Kingdom. This was done in order to fulfil the conditions required by Imperial law, so that Commonwealth stock might be a security in which a trustee in the United Kingdom may invest. See Colonial Stock Act 1900 (63 & 64 Vict. c. 62) and Treasury Order of 6th December 1900, made thereunder.

NAVAL LOAN ACT 1910.

The first Act passed authorizing the raising of a Commonwealth loan was the Naval Loan Act 1910. It was introduced by the



Deakin Administration, and it authorized the borrowing of £3,500,000 for the purpose of organizing naval defence and establishing the nucleus of a fleet unit. This Act was repealed in the following year by the Fisher Administration, which, with the help of additional taxation (chiefly the land tax) made provision for current naval expenditure and the acquisition of a portion of the fleet unit out of revenue.

#### LOAN ACT 1911.

The Loan Act 1911 was the first operative measure of its kind. It was declared by its preamble and schedule to be an Act to authorize the raising and expending of the sum of £2,460,476 for the following purposes :—

1. For the construction of a railway from Kalgoorlie to Port Augusta .. .. .	£1,000,000
2. For the acquisition of land in the Federal Capital Territory .. .. .	600,000
3. For the purchase of land and erection of buildings in London .. .. .	600,000
4. To redeem treasury bills issued by the Government of South Australia on account of the Northern Territory .. .. .	226,000
5. To pay to the State of South Australia amount expended from revenue towards construction of railway from Port Augusta to Oodnadatta .. .. .	34,476
	<hr/>
	<u>£2,460,476</u>

#### LOAN ACT 1912.

The Treasurer was authorized to raise and expend £529,526 to be appropriated as follows :—

1. For the acquisition for Commonwealth purposes of property in Perth, Western Australia and expenses incidental thereto .. .. .	£153,000
2. To redeem loans raised by the Government of South Australia on account of the Northern Territory .. .. .	71,945
3. To redeem loans raised by the Government of South Australia on account of the Port Augusta Railway .. .. .	304,581
	<hr/>
	<u>£529,526</u>

## LOAN ACT 1913.

The Treasurer was authorized to raise and expend £2,780,000 for the following purposes :—

1. For the construction of a railway from Kalgoorlie to Port Augusta .. ..	£1,400,000
2. For the construction of a railway in the Northern Territory from Pine Creek to the Katherine River and southward .. ..	400,000
3. For the construction of a railway from Port Moresby to Astrolabe ; and for the construction of wharves, Port Moresby and Samarai, Papua .. ..	60,000
4. For the purchase of land for post and telegraph purposes .. ..	170,000
5. For the construction of conduits and for laying wires under ground .. ..	425,000
6. For machinery, machine shops, and construction of wharves, Cockatoo Island, New South Wales .. ..	175,000
7. For the erection of London offices .. ..	150,000
	<u>£2,780,000</u>

## LOAN ACT 1914.

By this Act a further sum of £2,000,000 for the construction of the railway from Kalgoorlie to Port Augusta was authorized to be borrowed and expended.

## LOAN ACT (No. 2) 1914.

This Act authorized the raising and application of £7,986,000 for the following purposes :—

1. To redeem loans raised by the Government of South Australia on account of the Northern Territory .. ..	400,000
2. To redeem loans raised by the Government of South Australia on account of the Port Augusta Railway .. ..	£16,000
3. For the purchase of land for post and telegraph purposes .. ..	120,000
4. For the construction of conduits and for laying wires underground .. ..	450,000
5. To be paid into the consolidated revenue fund .. ..	7,000,000
Total .. ..	<u>£7,986,000</u>

## TREASURY BILLS ACT 1914.

The Governor-General may authorize the Treasurer from time to time to make out and issue Treasury Bills for raising by way of loan any money, authority to borrow which is granted by any Act ; and paying any expenses of carrying this Act into effect which the Governor-General considers are properly payable out of capital. Treasury Bills may be issued and sold in such amounts and manner and at such prices and on such terms and conditions as the Governor-General may direct. Treasury Bills shall cease on the date or dates fixed by the Governor-General as the dates upon which such Treasury Bills are redeemable.

## LOAN ACT 1915.

This was an Act to authorize the raising and expending of the sum of £1,500,000 for the construction of a railway from Kalgoorlie to Port Augusta.

## LOAN ACT 1917.

This was an Act to authorize the raising and expending of £1,862,000 for the following purposes :—

UNDER CONTROL OF DEPARTMENT OF WORKS AND  
RAILWAYS, viz. :—

Naval bases ; Cockatoo Island dockyards ; acetate of lime factory ; arsenal works and buildings ; Perth General Post Office ; Con- tribution under River Murray Waters Act 1915 ; railway—Queanbeyan-Canberra line ; capital required for “ plant and stores account .. .. .	£963,300
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UNDER THE CONTROL OF THE POSTMASTER-GENERAL'S  
DEPARTMENT :—

For the construction of conduits and for laying wires underground .. .. .	104,000
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UNDER CONTROL OF THE DEPARTMENT OF DEFENCE  
(MILITARY) :—

Acetate of lime factory—Machinery and plant ; General arsenal—machinery and plant ..	45,000
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UNDER THE CONTROL OF DEPARTMENT OF THE NAVY :—

Cockatoo Island dockyards—machinery and plant ; fleet construction ; Flinders naval depot ; wireless telegraphy .. .. .	550,000
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UNDER CONTROL OF HOME AND TERRITORIES DEPARTMENT :—

Purchase of sites for public buildings—Federal Capital Territory, defence purposes, naval bases, post and telegraph purposes, lighthouse workshops, store and offices, at Port Adelaide and Brisbane, quarantine stations, land for laboratory at Royal Park, Melbourne	148,600
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UNDER CONTROL OF DEPARTMENT OF TRADE AND CUSTOMS :—

New lighthouses and additions	..	..	51,100
Total appropriation	..	..	<u>£1,862,000</u>

SUGAR PURCHASE ACT 1915.

The treasurer may from time to time, borrow from the Commonwealth Bank, money not exceeding £500,000 for the purchase of sugar by the Commonwealth, and for the payment of customs duties on sugar imported by the Commonwealth.

The treasurer is required to pay into the Commonwealth Bank to the credit of an account, to be therein established, all moneys received by the Commonwealth in respect of the sale of sugar so purchased. Such account is to be charged with interest at the rate of 5 % per annum on the money lent by the Bank. The treasurer may close the account at any time when he is of opinion that there no longer exists any need for its continuance.

In the year 1915, owing to the war, the Commonwealth Government desired to control and stabilize the sugar industry in order that the price paid for cane might be increased, thus assisting the farmers. Raw sugar formerly sold at varying prices up to £13 and £14 per ton, was in 1916 immediately raised, when the Government assumed control, to £18 per ton, and this price was continued in 1917, and again raised to £21 per ton for the crops of 1918 and 1919. The retail price was fixed at 3½d. per lb., this being the lowest price in the world. As the result of operations in foreign sugar which had to be imported to make good the shortage in the Australian crop, a profit accrued to the Commonwealth Government upon its sugar transactions of over £500,000, which was paid to the Commonwealth revenue. To assist and encourage the fruit industry

sugar is sold to jam manufacturers at a concession price which enable them to successfully compete in the markets of the world for the sale of Australian jams and canned fruits.

#### STATES' LOAN ACT 1916.

The treasurer may from time to time, borrow in the United Kingdom £8,940,000 sterling, to enable the Commonwealth Government to make loans to the States to the following amounts, namely :

Victoria	..	..	£1,720,000
Queensland	..	..	2,562,000
South Australia	..	..	2,062,000
Western Australia	..	..	2,080,000
Tasmania	..	..	516,000
			<u>£8,940,000</u>

Pending the borrowing of the money authorized by this Act, the treasurer may advance to the respective States, out of War Loan's moneys granted by the Government of the United Kingdom to the Commonwealth, the sum specified in this Act.

#### STATES' LOAN ACT 1917.

The treasurer may from time to time borrow £8,000,000 sterling for the purpose of making loans to the States of Victoria, Queensland, South Australia, Western Australia and Tasmania. Pending the borrowing of such money, the treasurer may make advances to such States out of war loan money obtained by the Commonwealth Government from the Government of the United Kingdom.

The total money lent by the Commonwealth to the States amounts to £12,000,000. See *supra*, p. 54.

#### WAR LOAN ACT 1914.

By this Act passed 21st December, 1914, the treasurer was authorized to borrow money from or through the British Government to the amount of £18,000,000 for war purposes.

#### WAR LOAN ACT (No. 1) 1915.

This was an Act authorizing the treasurer to borrow the sum of £20,000,000 in Australia, under the Inscribed Stock Act or by treasury bills, for war purposes.

## WAR LOAN ACT (No. 2) 1915.

This was an Act to authorize the treasurer to borrow the sum of £6,500,000 from the Government of the United Kingdom.

## WAR LOAN ACT (No. 3) 1915.

This was an Act authorizing the treasurer to borrow the sum of £18,000,000 in Australia by inscribed stock or treasury bills for war purposes.

## WAR LOAN ACT 1916.

This was an Act authorizing the borrowing, in Australia, of the sum of £50,000,000 for war purposes, under the Inscribed Stock Act or by treasury bills.

## WAR LOAN (UNITED KINGDOM) (No. 1) 1916.

By this Act certain amendments were made in the War Loan Act 1914-1916.

## WAR LOAN (UNITED KINGDOM) (No. 2) 1916.

The Treasurer was authorized to borrow £25,000,000 from the Government of the United Kingdom for war purposes.

## WAR LOAN ACT 1917.

This was an Act to authorize the borrowing of £80,000,000 in Australia for war purposes under the Inscribed Stock Act or by treasury bills. For further particulars and details of Commonwealth borrowings in the United Kingdom and in Australia, see Notes, *supra*, p. 55, where it is stated that the total public debt and obligations of the Commonwealth in June, 1918, was £362,518,347.

## FREIGHT ARRANGEMENTS ACT 1915.

The Treasurer may from time to time borrow from the Commonwealth Bank, money for the purpose of entering into contracts and making arrangements for freight on Australian produce. All moneys advanced by the Commonwealth Bank under the Act and received and collected in respect of freight on Australian produce, are required to be entered in an account in the books of the Bank entitled " Commonwealth Treasurer Freight Arrangements Account " interest at the rate of 5 per cent. per annum is payable on the amount by which the said account is in debit. The account may be closed as soon as the Treasurer is of opinion that there is no longer any need for its continuance.

51. (v.) Postal<sup>53</sup> telegraphic, telephonic, and other like<sup>54</sup> services ;

### LEGISLATION.

#### POST AND TELEGRAPH ACT 1901-1913.

Provision is made for the administration of the postal, telegraphic, and telephonic services of the Commonwealth. The administration of the Act and the control of the Department is vested in the Postmaster-General. The Secretary to the Postmaster-General, under the Postmaster-General, has the chief control of the Departments throughout the Commonwealth. In each State there is a Deputy Postmaster-General who is the principal officer therein. The Minister may delegate any of his powers under the Act to any of the principal officers. The Governor-General may make arrangements with postal authorities of other countries for the transmission of mails between the Commonwealth and such countries. The Postmaster-General may make contracts for the carriage of mails by land and sea, but all such contracts must contain a condition that only white labour shall be employed in such carriage ; this condition, however, does not apply to the coaling and loading of ships at places beyond the limits of the Commonwealth. The railway authorities of the States and the owners and managers of private railways and tramways in any State are required to carry the mails subject to payment for such carriage on terms to be agreed upon or settled by arbitration. Arrangements are made for the issue and payment through the department of money orders and postal notes. Authority is given to make arrangements with the Postal Departments of other countries for the issue and payment of money orders and postal notes between the Commonwealth and such other countries. The Postmaster-General is given the exclusive privilege of providing and maintaining telegraph and telephone lines and of transmitting telegraphic and telephonic messages within the Commonwealth.

#### POST AND TELEGRAPH RATES ACT 1902-1913.

Postage rates are prescribed for the conveyance of newspapers, letters, and other postal articles posted within the Commonwealth for delivery therein, and rates for the transmission of telegrams within the Commonwealth.

**WIRELESS TELEGRAPHY ACT 1905.**

The Postmaster-General is given the exclusive privilege of establishing, maintaining and using stations and appliances in Australia for transmission or receipt of wireless messages, as regards communication either within Australia or with places or ships outside Australia. Provision is made for the grant of licences by the Postmaster-General, on such conditions as he may prescribe, for the establishment and use of wireless stations and appliances.

**TELEGRAPH ACT 1909.**

The Commonwealth Government is authorized, in case of any emergency in the nature of war or danger of war, to take possession or control of any submarine cable or wireless telegraph station and appliances within Australia.

**PACIFIC CABLE ACT 1911.**

The Pacific Cable Board is authorized on the part of the Commonwealth, to construct and work as part of the Pacific Cable a submarine cable between Doubtless Bay or any more convenient point in New Zealand and Australia, either direct or partly by means of a subterranean cable across the North Island of New Zealand, and any other extensions, connections, or re-arrangements in or near the Pacific Ocean which in the opinion of all the contributing Governments, are necessary or expedient for the improvement of the Pacific Cable Board's undertaking; and to apply towards the construction of that cable any moneys which it is authorized to apply to that purpose by an Act of the Parliament of the United Kingdom.

**POST AND TELEGRAPH RATES ACT 1918.**

By this Act an extra war postage of  $\frac{1}{2}$ d. is levied on each letter, card and newspaper posted to be delivered in the Commonwealth.

**§ 53. "POSTAL."**

**Exclusion of Matter from the Mails.**

The case of *Ex parte Jackson*, (1877) 96 U.S., 727, decided that Congress had power to pass a law authorizing the exclusion of lottery tickets from the mails. It was followed by the decision in *Re Rapier*, (1892) 143 U.S., 110, that Congress had an absolute discretion to determine the classes of matter which it would exclude as objectionable—irrespective altogether of the question whether Congress had power to regulate directly the subject-matter of the correspondence. In the *Public Clearing House v. Coyne*, (1904)



194 U.S., 1907, it was held that the provisions of the postal law authorizing the Postmaster-General to make a "fraud order" for the seizure and detention of *all* postal matter addressed to a person whom the Postmaster-General believes to be conducting a lottery or fraudulent scheme, was constitutional. In Australia, legislation similar to that thus upheld has been embodied in section 57 of the Post and Telegraph Act 1901: See *The King v. Arndel*, (1906) 3 C.L.R., 557. Note by Sir ROBERT GARRAN.

#### **Classification of Mail Matter.**

In *Lewis Publishing Co v. Morgan*, (1913) 229 U.S., 288, it was held that—subject to the express or necessarily implied limitations of the Constitution—Congress has a comprehensive power right to classify mail matter, and may exercise its discretion "for the purpose of furthering the public welfare as it understands it." Accordingly, it may favour the circulation of newspapers by special advantages, and prescribe the conditions on which these advantages may be exercised. The provisions of the Post Office Appropriation Act of 1912, United States, which deny the privileges of "second class mail matter" to periodicals unless they register with the Postmaster-General, and supply him with certain specified information, and which impose a penalty upon an editor or publisher who (after registration) prints, without marking it as "advertisement," editorial or other matter, the insertion of which is paid for, were held to be valid. Note by Sir ROBERT GARRAN.

### **§ 54. "OTHER LIKE SERVICES."**

#### **Wireless Telegraphy.**

In the *Attorney-General for New South Wales v. Brewery Employees' Union*, 6 C.L.R., at p. 501, the Chief Justice (Sir SAMUEL GRIFFITH), after observing that the meaning of the terms in the Constitution must be ascertained by their signification in 1900, said:—"On the other hand, it must be remembered that with advancing civilization new developments, now unthought of, may arise with respect to many subject matters. So long as those new developments relate to the same subject matter, the powers of the Parliament will continue to extend to them. For instance, I cannot doubt that the powers of the Legislature as to posts and telegraphs extend to wireless telegraphy and to any future discoveries of a like kind, although in detail they may be quite different from posts and telegraphs and telephones as known in the nineteenth century."

51. (vi.) The naval<sup>55</sup> and military<sup>56</sup> defence of the Commonwealth and of the several States, and the control of the forces to execute and maintain the laws of the Commonwealth ;

**Conspectus of Notes to Section 51 (VI.).**

§56 " MILITARY DEFENCE "

LEGISLATION.

First Defence (Barton-Forrest) Act 1903.

A Citizens' Army.

In times of peace.

In time of war.

The command.

The amended command.

Defence Act 1904.

Defence (Deakin-Ewing) Bill 1908.

Defence (Deakin-Cook) Act 1909.

Service in Australia.

Service outside Australia.

Compulsory military training.

Viscount Kitchener's visit.

Defence (Pearce) Act 1910.

Defence (Pearce) Act 1911-12.

Defence (Pearce) Act 1912.

Exemptions and penalties.

Defence (Pearce) Act 1917.

Summary of exemptions.

Subject to Army Act when abroad.

Obligations of employers.

Defence (Pearce) Act 1918.

Permanent force retained.

Soldiers when discharged.

Defence (Civil Employment) Act 1918.

General summary of defence system.

Growth of Commonwealth Citizen Forces.

Arms and branches of the Citizen Forces.

War powers.

Patents, Trade Marks and Designs Act 1914.

Enemy Contracts Annulment Act 1915.

War Precautions Act 1914-15.

War Precautions Act 1918.

Trading with the Enemy Act 1914-16.

War Pensions Act 1914-16.

Unlawful Associations Act 1916.

Wheat Storage Act 1917.

Australian Soldiers' Repatriation Act 1916-17.  
Deceased Soldiers' Estates Act 1918.  
War Service Homes Act 1918.  
Compulsory military service referendum.  
Trading with the enemy.  
Powers of Defence Minister.  
Fixing selling prices of goods during the war.  
Australian military forces—Peace footing.  
Australia in the Great War.  
Military cost of the war.

## § 56. "MILITARY DEFENCE."

### LEGISLATION.

#### DEFENCE (BARTON-FORREST) ACT 1903.

##### **Pre-Federal Military Forces.**

The strength of the military forces of the several States on the eve of Federation, 31st December, 1900, was as follows:—New South Wales, 9,338; Victoria, 6,335; Queensland, 4,028; South Australia, 2,932; Western Australia, 2,696; Tasmania, 2,024; total for Australia, 27,353.

##### **First Defence Act.**

Under the terms of the Constitution the Commonwealth, in March, 1901, took over the government of the defence forces, and they were administered according to the law of the several States until the passage of the first Commonwealth Defence Act in 1903. The Right Hon. Sir JOHN (afterwards Lord) FORREST, was the first Minister of Defence who had the honor of formulating and introducing into Parliament, the newly federalized defence scheme. The Act, which was assented to on 22nd October, 1903, provided for the re-organization and unification of the defence forces, under Commonwealth law.

The Governor-General was authorized to raise, maintain and organize in the manner prescribed by regulations such permanent and citizen forces as "he deemed necessary for the defence and protection of the Commonwealth and of the several States."

The naval and military forces existing at the commencement of the Act were deemed to have been raised under the Act, and members thereof, without any re-appointment or re-enlistment.

### **A Citizen Army.**

It was declared that the defence forces of Australia should consist of naval and military forces of the Commonwealth, and should be divided into two branches, called the Permanent Forces and the Citizen Forces.

No permanent military forces could be raised and maintained or organized except for administrative and instructional purposes, including Army Service, Medical and Ordnance Staffs, Garrison Artillery, Fortress Engineers, and Submarine Mining Engineers. The Permanent Forces were to consist of officers, soldiers, petty officers, and sailors who were bound to continuous naval or military service for a term. These forces were used partially for garrisoning the naval strategical bases, for maintenance of valuable stores and equipment, and above all, for the instruction of the Militia and Volunteer Forces during peace and for stiffening them in times of war. The Permanent Force consisted of 1,329 of all ranks. There was, in addition, a small permanent General and Instructional Staff, consisting of both commissioned and non-commissioned officers.

### **In Time of Peace.**

The Citizen Forces were divided into Militia Forces, Volunteer Forces and Reserve Forces. The Militia Forces were to consist of officers, soldiers, petty officers and sailors who are not bound to continuous naval or military service and who were partially paid for their services as prescribed.

The Militia made up the principal portion of the land forces, absorbing the great bulk of the Citizens' Army. They constituted a mobile field force of troops whose duty was to carry out active operations in the field in defence of the Commonwealth as a whole. Its principal elements were two light horse brigades and six divisions of infantry, two field artillery brigades, four companies of engineers, two companies of army service corps and three field ambulances. The members of this Militia were paid for their attendance at drills at rates which gave £12 a year to each member of the infantry and £14 to each horseman. If any member of the military forces were killed on active service or on duty, or died or became incapacitated from earning his living, from wounds or disease contracted on active service on duty, provision had to be made for his widow and family or for himself, as the case might be, out of the Consolidated

Revenue Fund at the prescribed rates. Each unit of the field force had a peace as well as a war establishment. The peace establishments provided for nearly a full complement of officers and non-commissioned officers, with approximately one-half of the rank and file required for the war establishment. The peace cadres by this plan could be completed upon mobilisation to the requirements of war without difficulty.

The Volunteer Forces were to consist of officers, soldiers, petty officers, and sailors who were not bound to continuous naval or military service and who were not ordinarily paid for their services in times of peace.

The Reserve Forces consisted of members of rifle clubs constituted in the manner prescribed, who had taken the oath set out in the second schedule, before an officer or justice of the peace, or before a person authorized by regulation to receive such oath; and persons who, having served in the active forces or otherwise as is prescribed, were enrolled as members of the Reserve Forces.

The Governor-General was authorized to establish and maintain naval and military cadet corps consisting of boys over twelve years of age who are attending school; or youths between fourteen and nineteen years of age who are not attending school.

Except in time of war the defence force was to be raised and kept up by voluntary enlistment only. Persons voluntarily enlisting as members of the permanent and militia forces were required to engage to serve for a prescribed period of not less than three years, and as members of the Volunteer Forces and Reserves for a prescribed period of not less than two years.

### **In Time of War.**

In time of war the Governor-General was authorized by proclamation to call out the Citizen Forces or any part thereof for active service. The Citizen Forces were liable to be employed on active service from the time of the publication of the proclamation calling out those Forces or any part thereof for active service until the publication of a proclamation notifying that the active services of those Forces or any part thereof were no longer required.

Members of the Defence Force who were members of the Naval Forces might be required to serve either within or beyond the limits

of the Commonwealth for the purpose of training or in time of war for the defence and protection of the Commonwealth and of the several States.

Members of the Defence Force who were members of the Military Forces could not be required, unless they voluntarily agreed to do so, to serve beyond the limits of the Commonwealth and those of any territory under the authority of the Commonwealth, but there was nothing to prevent any member of the Defence Force from volunteering to serve in any Force that might be raised by the Commonwealth to augment any of the King's Regular or other Forces, or to occupy or to defend any place beyond the limits of the Commonwealth.

In time of war all male inhabitants of Australia (excepting those who are exempt from service in the Defence Force) who have resided therein for six months and are British subjects and are between the ages of eighteen and sixty years were liable to serve in the Militia Forces.

#### **The Command.**

Under the heading of Administration, the Governor-General was authorized to appoint a military officer of the King's Regular Forces or of the Defence Force to be the General Officer Commanding the Military Forces of the Commonwealth. Major General HUTTON K.C.M.G., was the first and last G.O.C. of the Commonwealth Forces. The Governor-General was also authorized to appoint a naval officer of the King's Regular Naval Forces or of the Defence Force to be the Officer Commanding the Naval Forces of the Commonwealth. The General Officer Commanding and the Naval Officer Commanding were to have such powers and perform such duties as are prescribed or as the Governor-General directs, "and if there is no General Officer Commanding or Naval Officer Commanding or if those officers or either of them are absent from the Commonwealth or unable to exercise their powers or perform their duties those powers or duties may be exercised or performed by any person directed by the Governor-General to exercise or perform them."

In time of war, the Governor-General, subject to the provisions of this Act was empowered to place the Defence Force or any part thereof under the orders of the Commander of any portion of the King's Regular Forces or the King's Regular Naval Forces, as the case may be.

The Governor-General could appoint a Board of Advice to advise on all matters relating to the Defence Force submitted to it by the Minister.

#### DEFENCE ACT 1904.

##### **Amended Command.**

By this Act section 4 of the principal Act was amended by omitting therefrom the paragraphs defining "General Officer Commanding" and "Naval Officer Commanding," and by inserting in lieu thereof the following paragraphs:—"Inspector-General" means the Inspector-General of the Military Forces appointed under this Act. "Naval Commandant" means the officer in command of a State Division of the Naval Forces. Section 8 of the principal Act was amended by authorizing the Governor-General to appoint a Military Officer to be Inspector-General of the Military Forces; to appoint a Naval Officer to be Director of the Naval Forces, and to appoint an officer or officers of the Defence Force to command the whole or any portion of the Defence Force in time of war. The Inspector-General and the Director of the Naval Forces shall have such seniority and powers and perform such duties as are prescribed or as the Governor-General directs, and if there is no Inspector-General, or no Director of the Naval Forces, or if these officers, or either of them, is absent from the Commonwealth, or unable to exercise their powers or perform their duties those powers or duties may be exercised or performed by any person directed by the Governor-General to exercise or perform them.

In lieu of a Board of Advice, the Governor-General was authorized to constitute a Council of Defence having such powers and functions that might be prescribed by regulations, and also to constitute a Board of Administration for the Military Forces, to be called the Military Board, and a Board of Administration for the Naval Forces, to be called the Naval Board. The Military Board and Naval Board were to have such powers and functions as might be prescribed by regulations.

The objects aimed at by this change were—To establish continuity in defence policy; to maintain a continuous connection between parliamentary responsibility and the control and development of the Defence Forces; to establish continuity of administration; to separate administration from executive command so as to develop the independence of district commands, and by giving

scope to independent thought and initiative, make practicable a larger measure of decentralisation and more particularly to make possible the ultimate development of a citizen force ; to maintain a continuous state of efficiency on a uniform basis by the supervision of the Inspector-General of the Forces, who has to report to the Military Board and Council of Defence upon the efficiency, system, training, and equipment of the troops, their preparedness for war, and the state and condition of the defence works.

#### THE DEFENCE (DEAKIN-EWING) BILL 1908.

The system of military defence established by the Act of 1903, whilst it made the most of the then existing military forces and material, was plainly inadequate, either for the immediate requirements of Australia's defence, the development of Australia's manhood or the due performance of Australia's obligations as a portion of the British Empire. Public opinion in the newly established Commonwealth soon became educated and interested in the vital importance of national defence and the recognition of Australia's local as well as Imperial responsibilities. The movement in favour of compulsory military training and an instalment of compulsory military service for the defence of the Commonwealth on a wide and comprehensive footing was powerfully organized by the Australian Defence League. Fortunately the conscience of the country was thoroughly aroused. The Australian Defence League, under the guidance of Mr. W. M. HUGHES, who in 1904 was Minister for External Affairs in the Labour Ministry of Mr. J. C. WATSON, and Colonel Campbell of the Rifles Section, and its organ *The Call*, successfully taught the lesson that "defence is the business not of the government or of a class, but of the people and of all the people." Mr ALFRED DEAKIN, who was Prime Minister of Australia in the years 1907-1908, backed up by liberal and labour members, voiced the public sentiment of Australia in formulating a scheme of a national citizen army as an integral part of Australia's defence policy. The scheme which was outlined by Mr. DEAKIN in the House of Representatives on 13th December 1907 was afterwards, in October, 1908, materialised in a bill introduced into the House by Mr. (afterwards Sir) THOMAS EWING, the then Commonwealth Minister of Defence.

The leading features of the Deakin-Ewing Bill, were to provide that all male inhabitants of Australia (except those who were



exempted by reason of physical incapacity) who had resided therein for six months and were British subjects, should be liable to be trained to military service, as follows :—(a) From twelve to eighteen years of age, in cadet corps ; (b) from eighteen to twenty-six years of age, in the national guard.

Under this scheme Mr. DEAKIN calculated that 83,000 men would always be in training who would be supplemented every year by 30,000 ; and that the same number would pass annually into the Reserve and be organized into Rifle Clubs. In the eighth year, he estimated that 200,000 men would be available, fully armed, equipped and organized for the defence of the Commonwealth.

The central idea of Mr. DEAKIN's proposals for the naval defence of Australia was the gradual creation of an Australian Navy, closely linked to that of the mother country in sympathy, tradition and training, but paid for and controlled by the Australian Government.

#### DEFENCE (DEAKIN-COOK) Act 1909.

Parliamentary and party difficulties prevented Mr. DEAKIN from making any progress with his bill in Parliament. The second DEAKIN Ministry was defeated and resigned on 12th November, 1908. It was succeeded by the first FISHER Ministry which remained in office, without taking action in reference to military defence ; it was defeated on 2nd June, 1909. It was succeeded by the DEAKIN-COOK (Fusion) Ministry. This Government made national defence, based on compulsory military training and service, and the establishment of an Australian naval unit, the main planks in its policy.

Mr. (afterwards Sir) JOSEPH COOK, was appointed Minister of Defence, and to him was entrusted the task of formulating the new scheme. Colonel FOXTON, of Queensland, as an honorary Minister was sent to London to represent the Commonwealth Government at the Imperial Naval Conference. He performed his duty well, and brought back to Australia a new agreement with the Admiralty which became the foundation of an Australian Navy.

The cardinal provisions of Mr. JOSEPH COOK's far-reaching measure assented to on 13th December 1909 were embodied in Part XII. under the heading of " Universal Obligation in respect of Naval or Military Training," as follows :—All male inhabitants of Australia (excepting those who are exempted by this Act), who

have resided therein for six months, and are British subjects, shall be liable to be trained, as prescribed, as follows :—

- (a) From twelve years to fourteen years of age, in the Junior Cadets ; and
- (b) From fourteen to eighteen years of age, in the Senior Cadets ; and
- (c) From eighteen to twenty years of age, in the Citizen Forces ; and
- (d) From twenty to twenty-six years of age, in the Citizen Forces : “ provided that, except in time of imminent danger of war, service under paragraph (d) shall be limited to one registration or one muster-parade in each year.”

Mandatory registration of the names and addresses of all male persons being British subjects, who have resided in Australia for six months, upon attaining the age of fourteen years was made the foundation of the whole scheme of compulsion.

### **Re-classification.**

The Naval and Military Forces were re-classified and re-grouped as follows :—

### **Naval Forces.**

The Citizen Naval Forces were divided into Militia Forces, Volunteer Forces, and Reserve Forces. The Naval Militia Forces consisted of officers, petty officers, and sailors who are not bound to continuous naval service, and who are paid for their services as prescribed. The Naval Volunteer Forces consisted of officers, petty officers, and sailors who are not bound to continuous naval service, and who are not ordinarily paid for their services in times of peace. The Naval Reserve Forces consisted of members of Rifle Clubs who are allotted to the Naval Reserve Forces ; and persons who, having served in the active Naval Forces or otherwise, as is prescribed, are enrolled as members of the Naval Reserve Forces.

### **Military Forces.**

The Citizen Military Forces were to consist of Active Forces and Reserve Forces. The Active Citizen Military Forces consisted of the Militia Forces, the Volunteer Forces, those undergoing military training under the provisions of paragraph (c) of section 125 of the Act, and officers on the unattached list.

**Military Reserves.**

The Military Reserve Forces consisted of Citizen Forces, and included the officers shown on the Reserve of Officers' List, the members of the Rifle Clubs who are allotted to the Military Reserve Forces, and all those liable to serve in time of war under section 59 of the Act who are not included in the active Forces.

**Service Outside Australia.**

Members of the Military Forces voluntarily serving with the Imperial Forces outside Australia ; or on their way from Australia for the purpose of so serving ; or on their way back to Australia after so serving, are subject to the Army Act as if they were part of the Regular Forces, with such modifications and adaptations as are prescribed.

**Calling out the Reserves.**

In time of war it is lawful for the Governor-General, by proclamation, to call upon all persons liable to serve in the Citizen Forces to enlist and serve as prescribed. A proclamation under the last preceding sub-section may call upon all the persons liable to service in any military district or sub-district, who are specified in any one or more of the classes hereunder set out, so to enlist, but so that the persons specified in any class in that district or sub-district shall not be called upon to enlist until all the persons in that district or sub-district who are specified in the preceding classes are or have been called upon. The classes referred to are as follows :—

Class I.—All men of the age of eighteen years and upwards but under thirty-five years, who are unmarried, or widowers without children.

Class II.—All men of the age of thirty-five years and upwards but under forty-five years, who are unmarried, or widowers without children.

Class III.—All men of the age of eighteen years and upwards but under thirty-five years, who are married, or widowers with children.

Class IV.—All men of the age of thirty-five years and upwards but under forty-five years, who are married or widowers with children ; and

Class V.—All men of the age of forty-five years and upwards but under sixty years.

The Act further provided that a person who had been trained under the proposed new law should receive pay as prescribed ; that a person who was liable to be trained should not be required to enrol himself as a member of the militia forces ; that every person who without lawful excuse failed to render the personal services required should be ineligible for employment of any kind in the public service of the Commonwealth and other penalties were imposed.

### **Viscount Kitchener's Visit.**

At the end of the year 1909 and before the Act of that year came into operation, Field Marshall Viscount KITCHENER visited Australia at the invitation of the Commonwealth Government. After inspection of the military forces and the forts and defence works erected and in course of erection, Lord KITCHENER submitted a valuable report based on the provisions of the Defence Acts 1903-1909 with recommendations as to the organization of the proposed new defence forces of Australia, many of which were adopted by the Government.

The new Act embodying compulsory military training received the Royal Assent on 13th December, 1909, a few days before Viscount KITCHENER's arrival in Australia ; but it did not come into operation until 1st January 1911. By that time a change of government had taken place. The DEAKIN-COOK party was defeated at the general election held in April 1910. It was succeeded by the second FISHER (Labour) Government in which Senator GEORGE F. PEARCE was assigned the post of Minister of Defence. That Government remained in office until the general election in June 1913. The new Minister of Defence and his colleagues gave loyal and consistent support to the re-organized system of the naval and military defence. He had a number of perplexing problems to deal with in bringing the new scheme into operation. Many alterations in the original plan were found necessary in order to secure smooth working and to remove complaints and prevent anomalies and hardships.

### **Universal Training.**

By the Act of 1909, the principle of universal obligation to submit to compulsory military training and service was for the first time recognized and legalized in an English-speaking community. It was accepted with the general consent of all political parties in Australia.

A perusal of the amending Defence Acts shows slow tentative, but progressive, developments of the details of the scheme, embodying modifications and improvements which removed opposition and secured popular support.

#### DEFENCE (PEARCE) ACT 1910.

The section of the principal Act relating to the duration of universal training was by the Act of 1910 altered to read as follows :—

- (a) From twelve years to fourteen years of age, in the Junior Cadets, to continue for two years ; and
- (b) From fourteen to eighteen years of age, in the Senior Cadets, to continue for four years ; and
- (c) From eighteen to twenty-five years of age, in the Citizen Forces to continue for seven years ; and
- (d) From twenty-five to twenty-six years of age, in the Citizen Forces : provided that except in time of imminent danger of war service under paragraph (d) shall be limited to one registration or one muster-parade.

By the same Act the following compulsory training in each year ending 30th June was prescribed : (a) In the Junior Cadets ninety hours ; and (b) In the Senior Cadets four whole days drill, twelve half days' drills, and twenty-four night drills ; and (c) In the Citizen Forces sixteen whole day drills, or their equivalent of which not less than eight shall be in camps of continuous training : Provided that, in the case of those allotted to the Naval Forces and to the Artillery and Engineer arms of the Military Forces, and to units of the Army Service Corps allotted to those arms the training shall be twenty-five whole-day drills or their equivalent of which not less than seventeen shall be in camps of continuous training : Defence Act 1903-12, secs. 125 and 127.

#### DEFENCE (PEARCE) ACT 1911.

In the Senior Cadets the duration of a whole-day drill shall not be less than four hours, of a half-day drill not less than two hours, and of a night-drill not less than one hour :

In the Citizen Forces the duration of a whole-day drill shall not be less than six hours, of a half-day drill not less than three hours, and of a night drill not less than one hour and a half :

In the Senior Cadets the number and duration of half-day and night drills may be varied by the substitution of other drills as prescribed, of a total duration of not less than forty-eight hours :

The Minister may, by *Gazette*, notice declare that whole-day drills or half-day drills may be substituted for night drills in any districts or localities specified in the notice :

In the case of Senior Cadets, who reside over two miles from the place appointed for training, attendance for a less number of hours than prescribed above may be allowed to count as prescribed for the full statutory duration of drills, and power may be given to the prescribed officers to grant leave of absence from training required by this Act when the conditions of the weather, by reason of excessive rain or heat, would render attendance a hardship, and equivalent attendance as prescribed may be required in lieu thereof.

#### DEFENCE (PEARCE) ACT 1911-1912.

##### **Residence of Trainees.**

The law relating to compulsory registration was amended to read as follows : All male inhabitants of Australia, who have resided therein for six months and are British subjects and whose *bona fide* residence is within a distance of five miles, reckoned by the nearest practicable route, from the nearest place appointed for training, shall register themselves, or be registered by a parent, guardian or other person acting *in loco parentis*, in the manner prescribed. Every youth so residing was required to be registered on attaining his fourteenth birthday.

##### **Compulsory Training.**

Junior cadet training, lasting for two years, consists of 90 hours each year, and begins on the 1st July in the year in which the trainee reaches the age of twelve years.

Senior Cadet training, lasting for four years, begins on the 1st July of the year in which the trainee reaches the age of fourteen years. It consists of forty drills each year, of which four are classed as whole days of not less than four hours, twelve as half days of not less than two hours, the remainder being night drills of not less than one hour.

Training in the Militia Adult Citizen Forces, lasting for eight years, begins on 1st July of the year in which the soldier reaches the age of eighteen years.

The work consists of continuous training in camp for seventeen days in the case of the naval forces, artillery, and engineer arms,

and eight days for other arms, and eight days (or equivalent) home training for all arms. The total service is thus twenty-five days per annum for the specialist and technical corps, and sixteen days per annum for other corps, the main body of whom are light horse and infantry. In the last year of their service only registration muster-parade in normal peace times is necessary.

#### DEFENCE (PEARCE) ACT 1912.

##### **Exemptions and Penalties.**

The Governor-General may by proclamation exempt from the training mentioned in Part XII. of this Act in time of peace all persons residing within any area specified in the proclamation : vary or extend any area so specified ; or withdraw any exemption under this section ; or limit any exemption under this section to any part of the training required by this Act ; may grant a temporary exemption for a period not exceeding one year to persons who reside outside the areas in which training is carried out ; and to persons who reside at so great a distance from the place appointed for training that compulsory attendance at the training would involve great hardships.

Penalties for failure to attend compulsory drill, or for breach of discipline are provided by the act, rendering offenders liable to a fine or detention in barracks.

#### DEFENCE (PEARCE) ACT 1917.

##### **Exemptions.**

This Act consolidates previous Acts and, among other things, the various exemptions from compulsory training are conveniently gathered together in one section.

The exemptions from compulsory drill and service provided by the Act of 1909 as amended by subsequent Acts are as follows : viz. :—

- (a) Those who have been reported by the prescribed medical authorities as unfit for any naval or military service whatever ; and
- (b) Those who are not substantially of European origin or descent, of which the medical authorities appointed in that behalf under the regulations shall be the judges : Provided that this exemption shall not extend to duties of a non-combatant nature ; and

- (c) School teachers who have qualified at a school of naval or military instruction or other prescribed course as instructors or officers of the Junior or Senior Cadets ; and
- (d) Members of the permanent Naval or Military Forces ; and
- (e) Persons employed in the police or prison services of the Commonwealth or of a State ; and
- (f) Persons whose *bona fide* residence is not within a distance of five miles, reckoned by the nearest practicable route, from the nearest place appointed for training : Provided that the regulations may authorize the District Commandant to grant temporary exemption for a period not exceeding one year, renewable from time to time, to persons who reside at so great a distance from the places appointed for training that compulsory attendance would involve great hardships.
- (g) Persons liable to be trained in the Junior Cadets who are certified by any prescribed medical authority to be unfit to undergo the whole or any part of the prescribed training may be exempted from that training by any prescribed authority.
- (h) Persons who are students at a theological college as defined by the regulations, or theological students as prescribed, may, while they remain such students, on application be exempted by any prescribed authority from the prescribed training, but shall on ceasing to be such students undergo such equivalent training as prescribed, unless exempted by some provisions of this Act.
- (i) Persons who have served on war service may be exempted from the prescribed training for such period and under such conditions as are prescribed.
- (j) The Minister may, by order, under his hand, grant to any person upon whom, or upon whose parents or dependants, the Minister is satisfied that his compulsory attendance at the prescribed training would impose great hardship, an exemption from the prescribed training ; but any exemption granted in pursuance of this sub-section shall be for such period, and shall be subject to such conditions and reservations, as the Minister thinks fit.



**Subject to Army Act.**

Members of the Military Forces whether on war service or not, serving with Imperial Forces outside Australia ; or on their way from Australia for the purpose of so serving or on their way back to Australia after so serving or after war service, shall be deemed to be on war service and shall be subject to the Army Act as if they were part of His Majesty's Regular Land Forces, with such modifications and adaptations as are prescribed.

Subject to any Imperial Act, members of the Imperial Forces serving in Australia with the Defence Force shall be subject to this Act.

The Military Forces shall at all times, whilst on war service, whether within or without the limits of the Commonwealth, be subject to the Army Act save so far as it is inconsistent with this Act and subject to such modifications and adaptations as are prescribed, including the imposition of a fine not exceeding twenty pounds for an offence either in addition to or in substitution for the punishment provided by the Army Act, and the increase or reduction of the amount of a fine provided by the Army Act. Provided that the regulations shall not increase the fine for any offence so that it exceeds twenty pounds.

**Obligations of Employers.**

An employer is enjoined not to prevent an employee, and a parent or guardian must not prevent any son or ward from rendering the personal services required of him under the Act. An employer shall not in any way penalize or prejudice, in his employment, any employee for rendering the personal service required of him under Parts III. and IV. of this Act or for voluntarily enlisting or attempting to enlist in any force raised for active service either within or without the limits of the Commonwealth, either by reducing his wages or dismissing him from his employment or in any other way.

The rendering of the personal service or the enlistment referred to in this section shall not terminate a contract of employment. but the contract shall be suspended during the absence of the employee, for the purposes referred to in this section ; but nothing in this section shall render the employer liable to pay an employee for any time when he is absent from employment for the purposes referred to in this section.

In any proceedings for an offence against this section it shall lie upon the employer to show that any employee proved to have been dismissed or to have been prejudiced or penalized in his employment or to have suffered a reduction of wages, was so dismissed, penalized or prejudiced in his employment or reduced for some reason other than that of having rendered the personal service required of him under Parts III. and IV. of this Act or of having voluntarily enlisted or attempted to enlist in a force raised for active service, either within or without the limits of the Commonwealth.

The Court may direct that the whole or any part of the penalty recovered from an employer for an offence against this section shall be paid to the employee.

#### DEFENCE (PEARCE) ACT 1918.

##### **Permanent Forces.**

If the Governor-General by proclamation declares that by reason of the recent existence of a time of war it is necessary in the public interest that permanent military forces should be maintained after the cessation of the time of war, permanent forces raised in time of war for purposes other than those specified in sub-section (2) of this section may be maintained after the time of war and so long as that proclamation remains in force.

##### **Discharge.**

A soldier is entitled to be discharged if voluntarily enlisted or appointed—upon the expiration of the period for which he is engaged ; if serving under Part IV. of this Act—when the time of war has ceased to exist ; and if serving under Part XII. of this Act—upon the expiration of the period during which he is by this Act required to serve.

A soldier who would, under paragraph (a) or (c) of sub-section (1) of this section, be entitled to be discharged, shall not be entitled to be discharged, in time of war, or so long as a proclamation issued under sub-section (3) of section 31 of this Act remains in force.

Any member of an Expeditionary Force raised for service outside Australia in time of war, who returns to Australia after the cessation of the time of war, and while a proclamation issued under sub-section (3) of section thirty-one of this Act remains in force, and who after arrival at the port of his final disembarkation in

Australia makes written application to his Commanding Officer for his discharge, shall be entitled to be discharged within two months from the date of the making of the application.

When a soldier becomes entitled to be discharged he shall be discharged with all convenient speed, but until discharged shall remain a member of the Defence Force.

#### DEFENCE (CIVIL EMPLOYMENT) ACT 1918.

##### **Civil Service in Defence Department.**

On and after the passing of this Act all public service offices in the Department of Defence shall cease to be public service offices, and become civil offices in the Defence Force; and all public servants employed permanently in the Department of Defence, and, subject to the next succeeding section, all public servants employed temporarily in the Department, shall cease to be subject to the Commonwealth Public Service Act 1902-1917 except Part IV. thereof and the regulations relating to that Part, and become and be deemed to be persons employed in civil capacity in connection with the Defence Force.

The Act will not be applied to public servants temporarily employed, if within fourteen days from its commencement they enter an objection in writing; if they object they will remain subject to the Commonwealth Public Service Act 1902-1917.

This Act continues in operation only during the war and twelve months thereafter.

#### DEFENCE ACT (No. 2) 1918.

##### **Promotion.**

An officer who is eligible for promotion to a higher rank, and who has served on active service abroad, shall, other things being equal, be granted preference in promotion to an officer of the same rank who is eligible for promotion to that higher rank, and who has not served on active service abroad.

##### **Apprentices.**

In time of war any person who is employed under articles of apprenticeship may, notwithstanding any provision of or obligation under the articles, enlist in the Military Forces, and any person

who so enlists shall not be liable, during the period of his service in the Forces, and until a reasonable period thereafter to be claimed for service under the articles.

Any person employed under articles of apprenticeship who has in time of war enlisted in the Military Forces shall, upon discharge from the Military Forces, unless the Minister otherwise determines, be entitled, within a period of three months after the date of his discharge, or in the case of a person discharged before the commencement of this section, within three months after such commencement to resume his employment under his articles of apprenticeship and the period served by him after discharge shall be deemed to be a continuance of the period served by him prior to enlistment.

If any master, upon the application of an apprentice who is entitled under the last preceding sub-section to resume his employment, refuses to re-employ him, he shall be guilty of an offence.

#### **Resisting Draft.**

Any persons who when called upon in pursuance of this Act to enlist, fails to attend at the time and place appointed for medical examination or enlistment ; or counsels or aids any person, who is liable to enlist in the Defence Force, to fail to enlist or to evade enlistment ; or counsels or aids any person who has enlisted or who is liable to enlist in any part of the Defence Force not to perform any duty he is required by this Act to perform ; or conceals or assists in concealing any person who is liable to enlist in the Defence Force, shall be guilty of an offence.

#### **Detention of Trainees.**

No person is liable under any one order to detention in barracks in excess of thirty days in respect of offences committed by him against section 135 of the Principal Act.

#### **General Summary of Military Defence System.**

By the Defence Acts of 1903-1904 all male inhabitants of Australia between the ages of eighteen and sixty years were made liable to serve in the defence forces *in time of war*. The more recent Acts make training and service compulsory *in time of peace*. By the Act of 1909 the principle of universal liability to be trained was made law for the first time in any English-speaking community.

The main provisions of the Act of 1909 were the enactment of compulsory military or naval training, with regulations for registration, enrolment, and exemption. Statutes were passed subsequently extending or modifying the legislative provisions, removing obstacles and difficulties, and, where necessary, providing machinery.

### **Permanent Force.**

The permanent military forces which are recruited by voluntary enlistment only are, in peace times, practically limited to a few thousand soldiers who provide instruction and administration for the citizen forces.

### **Compulsory Training.**

All boys, 12 to 14 years of age, are compelled to train in the Junior Cadets, and those 14 to 18 years of age in the Senior Cadets. The training includes elementary drill and physical exercises. Young men, 18 to 26 years of age, are required to train in the Citizen Forces from 16 to 25 whole days annually, in organizations known as the Militia. At least 8 days must be in camps of continuous training. There are no exemptions except for men in outlying districts where training is impracticable, and those medically unfit.

### **War Service.**

In time of war all males, who are British subjects, and 18 to 60 years of age, must serve when called out, being divided into classes where in the younger and unmarried men are first called out. The classes are called out by proclamation, and Parliament must be summoned, if not sitting, to meet within 10 days thereof. Ordinary exemptions are specified and not numerous, but in order to maintain necessary national work persons engaged in certain employment may be exempted by regulation or proclamation.

Those who form part of the Militia are called out in their units, without reference to the conditions above set out for the "levy en masse."

### **Service Abroad.**

The Military Forces are intended for Australian defence, and are not required to serve abroad except voluntarily, but troops for foreign service may be raised by voluntary enlistment under the authority of the Governor-General.

The whole of the Australian Imperial Force and the expedition to German New Guinea were raised during the great war by voluntary enlistment, and organized in new units distinct from the Militia.

### **Discipline and Penalties.**

The discipline of the troops is based on a code of regulations and orders practically the same as in the British Army. During peace the penalties are, however, lighter, and mostly in the form of fines, owing to the character of the force. Imprisonment is, when not laid down by the Act, limited to three months, and penalties to £20. More serious sentences are prescribed by the Act for special offences, and some of these apply to persons not members of the forces, *e.g.* for fraud in relation to military supplies, and recruiting offences. The procedure in the hearing of cases by Commanding Officers and trials by Courts Martial is similar to that of the British Army.

In time of war and for a limited period thereafter, all troops, serving in or outside of Australia, are subject to the Army Act, with a few limitations such as those affecting the infliction of the death penalty.

### **Powers in Regard to Property.**

For military purposes the Government may take over railways and billet troops in time of war, and at any time may enter and use lands, stop traffic on roads, and order registration of and acquire any vehicle (for air, land or sea traffic) any transport animals, and goods: Defence Act, sections 64-72.

### **General Powers.**

Apart from the powers given for specified purposes the Defence Act, in section 63, empowers the Governor-General, subject to the provisions of the Act, to do all matters and things deemed by him to be necessary and desirable for the efficient defence and protection of the Commonwealth or of any State. Under this authority was created, *inter alia*, the whole of the organization known as the censorship, to deal with communications by wireless, cable, telegraph and postal means.

### **Growth of Citizen Forces.**

The following table prepared for this work by the Secretary for Defence (Mr. Trumble) shows the growing man strength and numbers

of the military forces of the Commonwealth between the establishment of the first Commonwealth Militia and during the years of the great war, also the various branches and divisions of the Forces :

**STRENGTH OF MILITARY (PERMANENT, CITIZEN AND  
VOLUNTEER) DEFENCE FORCES 1901 TO 1918.**

DISTRICT.	1901. 1/3/01	1911. 30/6/11	1914. 30/6/14	1916. 30/6/16	1918. 30/6/18
Headquarters ..	..	141	330	360	506
Queensland ..	4,310	3,371	5,844	9,379	13,948
New South Wales ..	9,772	8,206	16,365	24,761	37,862
Victoria ..	7,011	6,905	14,326	23,830	34,778
South Australia ..	2,956	1,990	4,708	8,154	12,872
Western Australia ..	2,283	1,600	2,046	4,197	5,516
Tasmania ..	2,554	1,986	2,026	3,446	4,590
<b>TOTAL ..</b>	<b>28,886</b>	<b>24,199</b>	<b>45,645</b>	<b>74,127</b>	<b>110,072</b>

**ARMS AND BRANCHES OF THE COMMONWEALTH (PERMANENT  
CITIZEN AND VOLUNTEER) DEFENCE FORCES, 1916.**

Light Horse ..	9,932	Area Officers ..	202
Field Artillery ..	3,975	Administrative and In-	
Garrison Artillery ..	1,353	structional Staff ..	1,220
Engineers ..	3,977	Pay Department ..	184
Infantry ..	46,522	Rifle Ranges, Rifle Clubs,	
Intelligence Corps ..	5	Officers, etc. ..	65
Army Service Corps ..	1,690	Royal Military College ..	148
Army Medical Corps ..	2,675	Engineer and Railway Staff	48
Army Nursing Service	261	Other Permanent Units ..	1,530
Army Veterinary Corps	25		
Ordnance Department			
(including Armament			
Artificers) ..	315	<b>GRAND TOTAL ..</b>	<b>74,127</b>

**ARMS AND BRANCHES OF THE COMMONWEALTH PERMANENT,  
CITIZEN, AND VOLUNTEER FORCES, 1918.**

Light Horse ..	10,676	Ordnance Department	
Field Artillery ..	5,628	(including Armament	
Garrison Artillery ..	1,711	Artificers) ..	321
Engineers ..	5,437	Area Officers ..	294
Infantry ..	74,312	Administrative and In-	
Intelligence Corps ..	13	structional Staff ..	1,124
Army Service Corps ..	2,282	Pay Department (Per-	
Army Medical Corps ..	3,969	manent) ..	44
Australian Flying Corps	1	Rifle Ranges, Rifle Clubs,	
Australian Army Pay		Officers, etc. ..	68
Corps ..	1,144	Royal Military College	144
Army Veterinary Corps	31	Engineer and Railway	
Army Nursing Service ..	513	Staff ..	47
		Other Permanent Units	2,313
		<b>GRAND TOTAL ..</b>	<b>110,072</b>

## WAR POWERS.

### PATENTS, TRADE MARKS AND DESIGNS (FISHER-HUGHES) ACT 1914.

#### **Suspension.**

The Governor-General, during the continuance of the present state of war and for a period of six months thereafter, is authorized to make rules under sections 108 and 109 of the Patents Acts 1903-1909, section 94 of the Trade Marks Act 1905-1912 and section 41 of the Designs Act 1906-1912 for avoiding or suspending in whole or in part any patent or licence, the person entitled to the benefit of which, is the subject of any State at war with the King ; for avoiding or suspending the registration, and all or any rights conferred by the registration, of any trade mark or design the proprietor whereof is a subject as aforesaid ; for avoiding or suspending any application made by any such person under any of the Acts referred to ; and for enabling the Minister to grant, in favour of persons other than such persons on such terms and conditions, and either for the whole term of the patent or registration, or for such less period as the Minister thinks fit, licences to make use exercise or vend patented inventions and registered designs, so liable to avoidance or suspension as aforesaid. This Act applies to any person resident and carrying on business in the territory of a State at war with the King as if he were a subject of that State.

### ENEMY CONTRACTS ANNULMENT (FISHER-HUGHES) ACT 1915

#### **Annulment.**

All contracts made before or during the war by a British subject with an enemy subject, or in which an enemy subject has any material interest, made during the state of war, may be declared by the Attorney-General of the Commonwealth, to be an enemy contract and null and void.

Either party to a contract to which this section applies may, by notice in writing to the other party, terminate the contract as regards all rights and obligations relating to any future supply or delivery under the contract.

### WAR PRECAUTIONS (FISHER-HUGHES) ACT 1914-1915.

#### **Public Service Regulations.**

The Governor-General may make regulations for securing the public safety and the defence of the Commonwealth, and for conferring such powers and imposing such duties as he thinks fit, for



securing the public safety and the defence of the Commonwealth, upon the Minister and upon the Naval Board and the Military Board, and the members of the naval and military forces of the Commonwealth, and other persons.

In particular the Governor-General may make regulations with a view to prevent persons communicating with the enemy or obtaining information for that purpose or for any purpose calculated to jeopardize the success of the operations of any of His Majesty's forces in Australia or elsewhere, or the forces of His Majesty's allies or to assist the enemy ; or to prevent the transmission abroad, except through the post, of any letter, post-card, letter-card, written communication, or newspaper ; or to secure the safety of His Majesty's forces and ships and the safety of any means of communication or of any railways, ports, harbours, or public works ; or to prevent the spread of false reports or reports likely to cause disaffection to His Majesty or public alarm, or to interfere with the success of His Majesty's forces by land or sea, or to prejudice His Majesty's relations with foreign powers ; or to confer on the Minister power, by warrant under his hand, to detain any person in military custody for such time as he thinks fit, if he is satisfied that such detention is desirable for securing the public safety and the defence of the Commonwealth ; or to secure the navigation of vessels in accordance with directions given by or under the authority of the Naval Board ; or otherwise to prevent assistance being given to the enemy or the successful prosecution of the war being endangered.

The Governor-General may by order published in the *Gazette* make provision for any matters which appear necessary or expedient with a view to the public safety and the defence of the Commonwealth, and in particular—for prohibiting aliens, either generally or as regards specified places, and either absolutely or except under specified conditions and restrictions, from landing or embarking in the Commonwealth ; for deporting aliens from the Commonwealth ; for requiring aliens to reside and remain within certain places or districts ; for prohibiting aliens from residing or remaining in any areas specified in the order ; for requiring aliens residing in the Commonwealth to comply with such provisions as to registration, change of abode, travelling, trading or otherwise as are specified in the order ; for applying to naturalized persons, with or without modifications, all or any provisions of any order relating

to aliens ; for requiring any person to disclose any information in his possession as to any matter specified in the order ; for preventing money or goods being sent out of Australia except under conditions approved by the Minister ; for appointing officers to carry the order into effect, and for conferring on such officers and on the Minister and on the Naval Board and the Military Board such powers as are necessary or expedient for the purposes of the order ; and for conferring on such persons as are specified in the order such powers with respect to the administration of oaths, arrest, detention, search of premises and persons, inspecting, impounding or retention of books, documents and papers, and otherwise, as are specified in the order, and for any other matters necessary or expedient for giving effect to the order.

Any person who contravenes, or fails to comply with, any provision of any regulation or order made in pursuance of this Act shall be guilty of an offence against this Act.

An offence against this Act may be prosecuted either summarily or upon indictment, or if the regulations so provide by court-martial, but an offender shall not be liable to be punished more than once in respect of the same offence.

#### DAYLIGHT SAVING ACT 1916.

##### Summer Time.

From the hour of two in the morning of the 1st January 1917, until the hour of two in the morning of the last Sunday in March next following that day, and thereafter from the hour of two in the morning of the last Sunday in September in each year until the hour of two in the morning of the last Sunday in March in the next following year, Australian clock time shall, as regards each State and each territory being part of the Commonwealth, be one hour in advance of the standard time. Repealed 1917.

#### WAR PRECAUTIONS (HUGHES-WATT) ACT 1918.

##### Continuance of Act.

The preamble of this Act is interesting as showing its policy as a war measure. It is as follows :—“ Whereas by the War Precautions Act 1914-1916 it is enacted that the Governor-General may make regulations and orders for securing the public safety and the defence of the Commonwealth ; and whereas the said Act and the Regulations and Orders thereunder continue in operation

during the continuance of the present state of war, and no longer : And whereas it may not be possible before the war has ceased to make complete provision for a return to the normal conditions of peace : and whereas the expiration of the said Act and of all Orders and Regulations made thereunder, in the absence of such provision, would cause great public danger and inconvenience."

The Act then goes on to declare that the principal Act shall continue in force during the state of war and for a period of three months thereafter, until the 31st July, 1919, or whichever period is the longer.

#### TRADING WITH THE ENEMY (FISHER-HUGHES) ACT 1914-1916.

##### **Prohibition.**

Any person who, during the continuance of the present war, trades, or attempts, or directly or indirectly offers or proposes or agrees, to trade, or has before the commencement of this Act traded, or attempted, or directly or indirectly offered or proposed or agreed, to trade, with the enemy, is declared to be guilty of an offence.

If any person without lawful authority deals, or attempts, or offers, proposes or agrees, whether directly or indirectly, to deal with any money or security for money or other property which is in his hands or over which he has any claim or control for the purpose of enabling an enemy subject to obtain money or credit thereon or thereby, he shall be deemed to be guilty of the offence of trading with the enemy within the meaning of this Act.

Provision is made for the appointment of a public trustee to act as custodian of enemy property in Australia during the continuance of the war. All money belonging to enemy subjects in Australia, must be paid into a trust account to the credit of a public trustee who has to deal with the same as directed by the Act. Persons holding or managing real or personal property belonging to an enemy subject is required to disclose and hand over such property to the possession and control of the public trustee. The public trustee is authorized to demand possession of all property belonging to an enemy subject. Out of such property or assets the public trustee is empowered to discharge all duties and obligations of the enemy subject, and to hold the balance of the money or property so vested in him in trust, until the termination of the present war, and thereafter to deal with the same in such manner as the Governor-General may direct.

The Minister of Trade and Customs, in cases where it appears to him that a business carried on in Australia by any person, firm, or company is, by reason of the enemy nationality or enemy association of that person, firm, or company, or of the members of that firm, or company or any of them, or otherwise, carried on wholly or mainly for the benefit of or under the control of enemy subjects, may, if he thinks fit, make an order requiring the business to be wound up.

The Minister may appoint a controller to conduct the winding up of the business, and in any case where it appears expedient to the Minister, he may as association requires, confer on the controller such powers as are exerciseable by a liquidator in a voluntary winding up of a company including power in the name of the person, firm, or company, or in his own name, and by deed or otherwise to convey or transfer any property.

The Minister may in any case where it appears to him to be expedient to do so, by order, vest in the Public Trustee any property, real or personal (including any rights whether legal or equitable, in or arising out of property, real or personal), belonging to or held or managed for or on behalf of an enemy subject, or the right to transfer that property, and may by any such order, or any subsequent order, confer on the Public Trustee such powers of selling, managing, and otherwise dealing with the property as to the Minister seems proper.

#### **THE WAR PENSIONS (FISHER-HUGHES-PEARCE) ACT 1914-1916.**

##### **Death or Incapacity.**

By this series of Acts provision is made for the payment of pensions upon the death or incapacity of members of the Defence Force of the Commonwealth and members of the Imperial Reserve Forces resident in Australia, whose death or incapacity results from their employment in connection with warlike operations.

Upon the death or incapacity of any member of the Forces whose death or incapacity results or has resulted from his employment in connection with warlike operations in which His Majesty is, or has since the commencement of the present state of war been engaged, the Commonwealth shall, subject to this Act be liable to pay to the member or his dependants or both, as the case may be, pensions in accordance with this Act.

It is, however, made a condition precedent to the right to claim a pension that the claim must be made, in the case of the death of a member of the Forces, by a dependant not more than six months after the date of the public notification by the Minister in the *Gazette* of the death of the member, except in the case of parents who, though not dependent upon the earnings of the member at the time of his death are at any time without adequate means of support; and in case of the incapacity of a member of the Forces by the member or a dependant not more than six months after the termination of the appointment or discharge of the member; except where the Commissioner is satisfied that failure to make the claim within the prescribed period was owing to some reason which in the opinion of the Commissioner is adequate.

### **Legal Right to Pension.**

The right of any person to payment by way of pension in accordance with this Act shall be substituted for his right to any payment in respect of incapacity or death, which, but for this Act would have been due under the Defence Act 1903-1915 or the Naval Defence Act 1910-1912, and any right of that person under either of those Acts shall be by force of this Act determined; and if the member or his dependants is or are entitled under any Imperial Act or State Act to receive any payment in respect of death or incapacity resulting from employment in connection with warlike operations in which His Majesty is, or has, since the commencement of the present state of war, been engaged, the rate or amount of that payment shall be taken into account in assessing the rate of pension payable under this Act.

### **Rate of Pension.**

The rates of pensions payable under the Act are as follows :—

In the case of the death of a member of the forces, to the widow or widowed mother of an unmarried son rates specified in the second column of the first schedule to the Act averaging according to age from £2 per fortnight to £6 per fortnight, and to each child the rate of £2 per fortnight for the first child, fifteen shillings per fortnight for the second child, and ten shillings per fortnight for the third and each subsequent child, and to the other dependant such rates as are assessed by the Commissioner or the Deputy Commissioner, as the case may be, but not exceeding in the aggregate the rates specified in the schedule.

In the case of the total incapacity of a member of the forces, the pensions payable under the Act are those specified in the schedule ranging from £3 to £6 per fortnight.

At the present time the Pensions Department is a branch of the Commonwealth Treasurer's Department, but it has been decided to bring its administration under the Minister for Repatriation, and steps are now being taken to that end. When the transfer has been accomplished the work of the two organizations will be in some respects simplified; and in the case of certain classes—as, for instance, widows with children and the totally incapacitated—the pension and repatriation allowances will be consolidated.

### Leading Features of Scheme.

In actual practice and administration the war pensions system of the Commonwealth works out in the following manner:—

Prior to discharge, the soldier who has become incapacitated through war service is granted a pension. The amount payable is generally fixed for a period of six months, after which the extent of his incapacity is re-assessed. Where definite permanent incapacity is found, payments are on a fixed scale. Such payments depend upon the incapacity and upon the daily rate of pay of the soldier. A man who becomes totally and permanently incapacitated, and who is receiving 6s. per day (the pay of a private), is awarded a pension of £1/10/- per week. The scale increases in relation to rank, but the maximum for even the highest officer is £3 per week. Special disabilities, such as the loss of an arm or a leg, or an eye, carry with them permanent pensions at fixed rates, the rates varying with the loss incurred. Wives of incapacitated men are entitled to pensions at half the rates granted to their husbands. Provision is also made for children. If the father is totally and permanently incapacitated, or is deceased, the first child receives 10/- per week, the second child 7/6, and each subsequent child 5/-. The pensions of widows of soldiers whose deaths result from war service vary according to the military rates of pay their husbands received. Where the soldier was paid 6/- per day the widow receives £1 per week, the scale increasing to a maximum of £3 per week.

The liberal nature of the scheme is illustrated by the following features:—

Apart from the wife and children of a soldier, the following members of his family are also entitled to pensions:—Father,

mother, grandfather, grandmother, step-father, step-mother, foster-mother, grand-son, grand-daughter, step-son, step-daughter, brother, sister, half-brother, half-sister, adopted child, mother-in-law, and ex-nuptial grand-child. These dependents, however, must have been wholly or partially dependent upon the soldier within twelve months prior to his enlistment. The rate of pension in such cases is assessed according to circumstances.

#### **Payments in Pensions.**

On 24th January 1919, the number of war pensions granted in the Commonwealth totalled 152,304, making an annual liability at that date of £4,542,742. In Victoria 50,581 pensions had been granted, representing an annual liability of £1,404,546, while in New South Wales the pensions numbered 48,244, representing a liability of £1,572,908. In addition to the annual liability for war pensions the Commonwealth has to meet the heavy expense of invalid and old-age pensions. Of invalid pensions, there were 31,004 in force in the Commonwealth on 24th January, 1919, while on the same date there were 95,432 old-age pensions in force. The Commonwealth Treasurer recently pointed out to the representatives of the States in Melbourne that the payments for the current year for old-age pensions were estimated at £3,925,000. When these heavy and essential payments are borne in mind the need for rigid economy in other directions and for a determination to abolish all wasteful and unnecessary extravagance in expenditure can be realized, in view of the vast financial burdens incident to the great war: *The Age*, 3rd February, 1919.

#### **UNLAWFUL ASSOCIATIONS (HUGHES-PEARCE) ACT 1916.**

##### **Members of I.W.W.**

The preamble of this Act, which is as follows, clearly defines its objects and limits its operations:—"Whereas an Association known as the Industrial Workers of the World and members thereof have been concerned in advocating and inciting to the commission of divers crimes and offences: and whereas it is expedient for the effective prosecution of the present war that laws shall be enacted for the suppression of such practices."

The Act proceeds to declare the following to be unlawful associations—the Association known as the Industrial Workers of the World; and any association which, by its constitution or propaganda, advocates or encourages, to the taking or endangering of

human life, or the destruction or injury of property ; and any association which the Governor-General, by notice published in the *Gazette*, declares to be, in his opinion, an unlawful association within the meaning of the last preceding paragraph. Provided that this last sub-section shall not apply in the case of any association registered under any arbitration law of the Commonwealth or any State, or any law relating to trades unions in any State.

Any person who becomes a member of an unlawful association ; or after the expiration of one month, from the commencement of this section, continues to be a member of an unlawful association, shall be guilty of an offence.

Any person who advocates or encourages, or incites or instigates to the taking or endangering of human life, or the destruction or injury to property, shall be guilty of an offence.

Any person who being a member of an unlawful association, advocates or encourages any action intended or calculated to prevent or hinder the production, manufacture or transport, for purposes connected with the war, of troops, arms, munitions, or warlike material, including foodstuffs, shall be guilty of an offence.

Any person who is convicted of an offence under any one of the last three preceding sections and who fails to satisfy the Attorney-General that he is a natural-born British subject born in Australia, shall be liable, in addition to the punishment imposed upon him for the offence and either during or upon the expiration of his term of imprisonment, to be deported from the Commonwealth pursuant to any order of the Attorney-General.

Any person who prints or published any writing advocating or encouraging, or inciting or instigating to, the taking or endangering of human life or the destruction or injury of property, shall be guilty of an offence.

Any person who knowingly gives or contributes money or goods to an unlawful association ; or receives or solicits subscriptions or contributions or money or goods for an unlawful association, shall be guilty of an offence.

No book, periodical, pamphlet, handbill, poster or newspaper issued by or on behalf or in the interests of any unlawful association



shall—if posted in Australia be transmitted through the post ; or in the case of a newspaper, be registered as a newspaper under the provisions of the Post and Telegraph Act 1901-1916.

Any person who knowingly prints, publishes, sells or exposes for sale any book, periodical, pamphlet, handbill, poster or newspaper issued or intended to be issued by or on behalf or in the interests of any unlawful association shall be guilty of an offence.

All property of any kind, real or personal, belonging to an unlawful association, or held by any person for or on behalf of an unlawful association may be taken possession of or seized by any person thereto authorized by a Minister of State or by a prescribed authority, and shall thereupon be forfeited to the Commonwealth.

#### WHEAT STORAGE (HUGHES-RUSSELL) ACT 1917.

##### **Storage of Wheat for Export.**

A Wheat Storage Commission may be appointed by the Governor-General, consisting of one representative of the Commonwealth and one representative of each of the States in which silos are to be erected.

The representative of the Commonwealth shall be appointed by the Governor-General and the representative of each State may be appointed by, or in such manner as is determined by, the Governor in Council of that State. The representative of the Commonwealth shall be *ex officio* chairman of the Commission.

The Commission may determine the design of silo to be adopted generally, or the particular design to be adopted in any particular place ; determine the number of silos to be erected, the places at which they are to be erected, the cost of each silo to be erected, and the cost per bushel to be charged for storing wheat therein ; arrange with the Governments of the respective States for the construction and erection of silos by, or under the supervision of, the proper authorities of those States ; arrange with the Governments of the respective States for the erection of such other temporary structures as may be found necessary. For the purpose of facilitating the construction and erection of silos in pursuance of this Act, the Commonwealth may from time to time advance to the States a sum not exceeding in the whole the sum of two million eight hundred and fifty thousand pounds. The amount advanced to

each State shall bear interest at such rate, and be repayable in such manner and at such times as the Governor-General approves. The Governor-General may make regulations not inconsistent with this Act prescribing all matters which are necessary or convenient to be prescribed for carrying out or giving effect to this Act.

#### AUSTRALIAN SOLDIERS' REPATRIATION (HUGHES-MILLEN) ACT 1916.

##### **Regulations.**

This measure is entitled "An Act to make provision for the repatriation of Australian soldiers." The actual legislation on this subject is very brief, being confined merely to the creation of a department presided over by a responsible Minister (Senator MILLEN being the first to occupy that office) and a Repatriation Commission consisting of seven members, of whom the Minister is chairman, and six other persons appointed by the Governor-General in Council; State repatriation boards and local committees:

The powers and functions of these bodies are to be defined by regulation. The Governor-General is authorized to make regulations prescribing all matters which by this Act are required or permitted to be prescribed or which are necessary or convenient to be prescribed for giving effect to this Act, and in particular for providing for the granting of assistance and benefits to Australian soldiers upon their discharge from service; to the children, under the age of eighteen years, of deceased and incapacitated Australian soldiers; and where, by reason of special circumstances, the Commission considers that assistance and benefits should be granted, to the widows of deceased Australian soldiers.

#### AUSTRALIAN SOLDIERS' REPATRIATION (MILLEN) ACT 1917.

##### **Benefits.**

The benefits of the Act are extended to the children of deceased or incapacitated Australian soldiers while those children are, by reason of physical or mental disability incapable of contributing to their own support or are under the age of eighteen years; free passages from abroad to Australia may be granted to the wives and children of Australian soldiers who have been declared by the competent Naval or Military Medical Board at the head-quarters abroad of the Australian Naval or Military Forces to be medically unfit for service, and who have been returned, or whom it is proposed to return, to Australia, or who at the termination of the war are awaiting return to Australia.

In special circumstances the Commission may grant assistance and benefits to the children of Australian soldiers still on active service who have become motherless or are neglected, the widows of deceased Australian soldiers, the mothers of deceased or incapacitated Australian soldiers who are widows and were, prior to the enlistment of those soldiers, dependent upon them, or whose husbands are so incapacitated as to be unable to contribute materially to their support, and the incapacitated fathers of deceased or incapacitated Australian soldiers who were, prior to the enlistment of those soldiers, dependent upon them.

No person to whom a gift or loan of money or goods has been made or granted under this Act for any purpose shall without first obtaining the consent of a State Board use the money or goods for any other purpose or sell or otherwise dispose of or in any way pledge, mortgage or deposit, by way of security, any goods so granted or any goods purchased with any money so given or lent.

No person is allowed, without the approval in writing of the Commission or State Board to invite subscriptions or raise money by any means whatsoever for any patriotic fund or any fund in relation to the war.

#### **Provision for Returned Soldiers.**

Under this legislation Australia has undertaken the care of the returned soldier as a national responsibility. No man who, upon the conclusion of his military service, is in need of assistance to re-establish himself in civil life is left to take his chance. Provision for his future welfare has been intrusted to the Department of Repatriation. Under the scheme which that Department has formulated the soldier can pass direct from military to civil life. It seeks to enable the individual who was drawing his military pay one day to become a wage-earner the next. Should employment not immediately be available a sustenance allowance is paid until it is. Should a soldier, through war service, not be in a position to immediately commence to earn his living again, a sustenance allowance is paid him until he is. Where a family has lost its breadwinner, provision is made for its support, and the dependants of the deceased soldier are maintained in comfort. Every feature of the scheme aims at repairing, as far as practicable, the economic loss which military service has entailed.

A soldier's pension having, for the time being, been determined, and his physical condition warranting it, he is discharged from the military forces. The soldier again becomes a citizen, and the responsibility of the Repatriation Department commences. If the ex-soldier needs assistance to re-establish himself in civil life, it is the duty of that Department to provide it. This does not mean that an applicant necessarily receives whatever assistance he fancies. His application must fall within the scope of the regulations framed by the Department.

### **Method of Relief.**

The Department gives relief and betterment to the returned soldier by vocational training, medical treatment and general and financial assistance.

### **Financial Assistance.**

Under the general assistance section provision for civil re-establishment is afforded in a variety of ways. A married soldier, unable to engage in his usual employment, or a soldier who, was dependent on a business which he conducted, may be advanced up to £250 to purchase a business, plant, or stock to again set himself up in life. Relief from onerous mortgages is provided. In such a case a sum not exceeding £150 is advanced to enable the debt to be transferred to an approved institution where interest terms are easier. Similarly an amount not exceeding £75 may be advanced to a soldier who is not incapacitated or his wife. For the purchase of tools of trade, professional instruments, or other articles of personal equipment necessary to an applicant in the exercise of his calling, a sum not exceeding £10 may be given by way of gift, and a sum not exceeding £50 by way of loan. A totally incapacitated soldier, or a widow in necessitous circumstances, is eligible for a gift of furniture to the value of £25, while soldiers who are not incapacitated are advanced up to £35 by way of loan for the purchase of furniture. Free passages to and from the Commonwealth are granted in a number of specified circumstances. Where it is shown that it will be of advantage to the recipient, free passages from the Commonwealth are given to incapacitated soldiers and their wives and children. Similarly, free passages to the Commonwealth are given to widows and orphans desiring to return to Australia, to the wives and children of soldiers who desire to join their husbands in Australia and to the fiancées, under certain guarantees, of soldiers.

**Blinded Soldiers.**

Irrespective of any other benefits to which blinded soldiers may be entitled under the regulations, the Department undertakes to provide each blinded soldier with a home, provided that the cost to the Department of such home shall not exceed the aggregate amount of £700, and further, that where a blinded soldier is not provided with a home under the housing scheme he may be granted as an alternative an allowance of £52 per annum. The premises are at the disposal of the soldier for as long a time as he may wish to occupy the same as a home, at a peppercorn rental of 1/- per annum. On the death of a blinded soldier the widow (if any) and other dependants are treated in the same manner as widows and other dependants of soldiers whose death has resulted from war service.

**Homes for Married Men.**

An Act has been passed providing for advances to enable men now married, or who will subsequently marry, to acquire homes on most liberal terms.

**Care of Soldiers and Dependants.**

Soldiers who are so seriously incapacitated that they are not in a position to provide for themselves, and widows and orphans, are the special care of the Department. For the totally and permanently incapacitated a living allowance on a liberal scale is provided. For the dependant mothers and fathers of soldiers, provision is also made.

**Land Settlement.**

Arrangements have been made by the Commonwealth with the State Governments to facilitate the grant of land to soldiers for land settlement. Land is offered to the soldiers on most favourable terms and conditions, coupled with loan and allowance of money to give them a start.

**Municipal Public Works.**

In pursuance of the intimation of the Commonwealth Government at the Premiers' Conference that it was prepared to advance money to local governing bodies to carry out necessary public works on which returned soldiers would be employed, the Minister of Repatriation (Senator MILLEN) announced on 4th March, 1919, that, pending the completion of arrangements regarding the loan.

and with a view to meeting present needs, and providing immediate employment, the sum of £500,000 would be made available by way of gift to the local governing bodies throughout the Commonwealth. This money is to be expended exclusively on works which will provide immediate employment for returned soldiers, and such works must be completed within six months, contingent upon a sufficient number of soldiers being available during the period *The Age*, 4th March, 1919.

#### DECEASED SOLDIERS' ESTATES (WATT-GROOM) ACT 1918.

This Act shall apply in respect of the military estate of any member dying or killed while on war service, or within three months from the date of his discharge, and irrespective of the place where the death occurs.

In the event of the death of a member while on war service the military estate of the member may be paid or delivered to the personal representative of the member ; to any person who, in the opinion of the prescribed authority, is beneficially entitled thereto ; or to such persons or classes of persons as are prescribed.

The payment or delivery of any money or other property in pursuance of this Act shall operate as a discharge of the Commonwealth from any liability in respect of the money or property.

Where it appears that there is no person to whom the military estate of a deceased member may be paid or delivered under section 4 of this Act, the proceeds of the estate shall be applied, as prescribed, to the creation or maintenance of any prescribed fund for the benefit of persons who are or have been members or dependants of members.

#### WAR SERVICE HOMES (WATT-GROOM) ACT 1918.

This measure is entitled an Act to make provision for homes for Australian soldiers and female dependants of Australian soldiers. The purposes of the Act are to be carried out by a commissioner subject to the directions of the Minister.

The benefits of the Act are limited to eligible persons as defined by the Act, including Australian soldiers who are married or who are about to marry or who have dependants for whom it is necessary for them to maintain homes ; or the female dependants of Australian soldiers, including the widows and mothers of such soldiers.

Any private land, or, with the consent of the Minister, any land being Crown land of a State, road or land which has been dedicated, reserved, or set apart for any public or other purpose, whether by any State or by any private person, and whether or not such land is vacant or has dwelling-houses or other buildings already erected thereon, may be acquired by the Commissioner for the purposes of this Act.

Before exercising any power under this section which involves the expenditure of more than Five thousand pounds, the Commissioner shall submit his proposal for the approval of the Minister.

The Commissioner may erect dwelling-houses on land acquired for the purposes of this Act, or may enter into contracts for the erection of dwelling-houses on land so acquired.

The total cost to the Commissioner of any dwelling-house acquired or erected in pursuance of this part together with the cost of the land on which it is erected, shall not exceed seven hundred pounds.

Subject to this Act the Commissioner may sell to any eligible person, who is not the owner of a dwelling-house within Australia or elsewhere, a dwelling-house acquired or erected in pursuance of the last preceding part, together with the land on which it is erected.

The sale may be upon such terms and subject to such conditions as are prescribed or are fixed by the Commissioner.

The price shall not exceed the capital cost to the Commissioner of the dwelling-house and land.

With the approval of the commissioner, a dwelling-house, together with the land on which it is erected, may be sold to an eligible person without a deposit

The purchaser shall be permitted to occupy the dwelling-house and land as a weekly tenant, and shall pay therefor a rental sufficient to cover interest at the prescribed rate, not exceeding Five pounds per centum per annum, on the capital cost of the property, together with insurance rates (if any), repairs, and such sum in reduction of the purchase money as the Commissioner thinks fit.

The Commissioner may, upon application in writing, make an advance to any eligible person on the prescribed security, for the

purpose of enabling him to erect a dwelling-house on land owned by him ; to purchase land and erect thereon a dwelling-house ; to purchase a dwelling-house, together with the land on which it is erected ; to complete a partially erected dwelling-house owned by him ; to enlarge a dwelling-house owned by him ; or to discharge any mortgage, charge, or encumbrance already existing on his holding.

The amount of the advance which may be made to any applicant under this Part shall be the amount (not exceeding ninety per centum of the total value of the property in respect of which the advance is made) which the Commissioner considers necessary in order to give effect to the purpose for which the advance is made, but the amount of the advance shall not in any event exceed the sum of £700.

#### **The First Compulsory Military Service Referendum.**

On the 28th October, 1916, a special referendum was held throughout the Commonwealth, when the following question with reference to compulsory military service was submitted to the people :—" Are you in favour of the Government having, in this grave emergency, the same compulsory powers over citizens in regard to requiring their military service, for the term of this War, outside the Commonwealth, as it now has in regard to military service within the Commonwealth ? " In New South Wales, Queensland and South Australia the majority of voters were not in favour of the prescribed question, and in Victoria, Western Australia and Tasmania the majority of votes cast were in its favour, the net result being a majority of 72,467 votes not in favour of the prescribed question.

#### **The Second Compulsory Service Referendum.**

A further referendum was held on 20th December, 1917, the question being, " Are you in favour of the proposal of the Commonwealth Government for reinforcing the Australian Imperial Force oversea ? " The proposal was that, while voluntary enlistment was to continue, compulsory reinforcements should be called up by ballot to make the total reinforcements up to 7,000 per month. In New South Wales, Victoria, Queensland and South Australia, the majority of voters were not in favour of the prescribed question ;



and in Western Australia, Tasmania and the Federal Territories, the majority of votes were cast in its favour, the net result being a majority of 166,588 votes not in favour.

### **Trading with the Enemy.**

The Trading with the Enemy Act (1914), section 2 providing that for the purposes of the Act, a person shall be deemed to trade with the enemy if he performs or takes part in “(b) any act or transaction which is prohibited by or under any proclamation made by the Governor-General and published in the *Gazette*,” is a valid exercise of the legislative power of the Commonwealth Parliament. A proclamation was issued by the Governor-General declaring that “any transaction with or for the benefit of a company to which this proclamation applies is hereby declared to be trading with the enemy, and is prohibited”; and (2) that “this Proclamation applies to any company, whether incorporated in any enemy country or not . . . (b) which the Attorney-General, by notice published in the *Gazette*, declares to be, in his opinion, managed or controlled, directly or indirectly, by or under the influence of, or carried on wholly or mainly, for the benefit or on behalf of, persons of enemy nationality, or resident or carrying on business in an enemy country.” By a notice published in the *Gazette* the Attorney-General declared the Welsbach Light Co. of Australasia Ltd. to be, in his opinion, “managed or controlled, directly or indirectly by or under the influence of, or carried on wholly or mainly for the benefit or on behalf of, persons of enemy nationality or resident or carrying on business in an enemy country.” In an action by the plaintiff Company against the Commonwealth and the Attorney-General claiming declarations that the proclamation was unlawful and that the notice was unlawful and contrary to fact and a consequent injunction and damages, it was held, by GRIFFITH, C.J., and BARTON, ISAACS, HIGGINS, GAVAN DUFFY and RICH, JJ. (POWERS, J. dissenting), that the Act was a valid exercise of the legislative power of the Commonwealth Parliament and that the plaintiff Company was not entitled to either declaration: *Welsbach Light Company of Australasia Ltd. v. The Commonwealth*, (1916) 22 C.L.R., 268.

### **Powers of Defence Minister.**

The War Precautions Act (1914) as amended by the Act of (1915), enacts that “The Governor-General may make regulations

for securing the public safety and the defence of the Commonwealth, and in particular with a view to"—then follows enumeration of six particular objects to which the regulations may be directed. Under this power the following regulations were made:—" 55. (1) Where the Minister has reason to believe that any naturalized person is disaffected or disloyal, he may by warrant under his hand, order him to be detained in military custody in such place as he thinks fit during the continuance of the present state of war."

On the 9th July, 1915, Franz Wallach of the Australian Metal Company, a person naturalized in Australia, was believed by the Minister of Defence to be disaffected and disloyal. The Minister, acting under regulation 55 (1), issued his warrant for the arrest and detention of the accused in military custody in Victoria. The prisoner applied to the Supreme Court of Victoria for a writ of *habeas corpus* for his discharge. On the return of the writ the Full Court by a majority (MADDEN, C.J. and A'BECKETT, J., CUSSEN, J. dissenting) ordered Wallach to be discharged: *R. v. Lloyd; Ex parte Wallach*, (1915) V.L.R., 476.

The grounds of this decision were that the particular regulation relied on was *ultra vires* and that the return to the writ was bad. The Crown, represented by Major Lloyd, appealed to the High Court. On its behalf it was contended that the War Precautions Act 1914-1915, which was passed under the power conferred by section 51 (VL.) of the Constitution to make laws with respect to naval and military defence, had, as its primary purpose, the making of regulations for the safety of the Commonwealth during the present state of war. The Act is a delegation of legislative power under peculiar circumstances and for special purposes, and its object is to provide means of legislating freely and quickly on all sorts of matters as they may arise and whether Parliament is sitting or not. It was urged that the grounds of the Minister's belief were not examinable: *R. v. Arndel*, 3 C.L.R., 577.

It was further argued that the Act does not repeal or infringe upon the Habeas Corpus Act, but authorizes the issue of a warrant which, like other warrants issued under the authority of a Statute, is a good answer to a writ of *habeas corpus*. The warrant in this case is a good answer, and the recitals in it cannot be inquired into on *habeas corpus*. If the warrant can be inquired into at all, the inquiry is ended when the Minister refuses to answer.

The Chief Justice (Sir SAMUEL GRIFFITH) said :—"The first question to be determined is as to the validity of the regulation. That depends on the proper construction of the Statute under which it purports to have been made. In my judgment this regulation falls within both branches of the enacting section. It lays down certain conditions under which persons may be detained in military custody, and imposes on the Minister of Defence the duty, first, of considering whether those conditions exist with respect to a particular person, and, secondly, if he has reason to believe that they do exist, of issuing a warrant ordering his detention. I think, therefore, that the regulation is within the power conferred by the Act, and is valid."

The Chief Justice continued :—"The next question to be considered is as to the validity of the return. This question arises upon the construction of the regulation itself.

"The return sets out that the respondent was detained in military custody under the authority of a warrant under the hand of the Minister of Defence which recited that he had reason to believe and did believe that the respondent, being a person naturalized in the Commonwealth, was disaffected or disloyal. The learned Chief Justice, Sir JOHN MADDEN, thought, as I understand his judgment, that this return did not show a good cause of detention, inasmuch as the warrant did not set out on its face the facts on which the Minister founded his belief, and further that the foundation of his belief was examinable by the Court on the return of the writ. In my opinion the regulation, upon its proper construction, means that the Minister, while required to satisfy himself of the facts, is permitted to do so by any means of which he chooses to avail himself.

"As to the fact of the Minister's belief, I am of opinion that the same principles are applicable as in the case of a claim of privilege against disclosure of documents or facts on the ground that such disclosure would be injurious to the public interests, in which case the statement of the public officer making the claim is conclusive, if the case is within the rule. So in this case the Minister cannot, in my judgment, be called upon to answer any question on the point, nor can any evidence be given to controvert his statement on the face of the warrant. It follows that for all practical purposes the statement is not examinable on the return of the writ (even if the case is within the Act, 56 Geo. III. c. 100, which I doubt), but

must be treated as conclusive. If it could be established *aliunde* in other proceedings that the statement was not true, that is, that the Minister had not, in fact, formed any such belief, the person aggrieved might perhaps have other means of redress against him.

"We are told that on the return of the writ the Minister at the request of the Court attended and was sworn as a witness, but refused to answer any questions as to his reasons for forming his belief. Apart from grounds of public policy, which would undoubtedly justify his refusal, the proposed inquiry was, as already pointed out, irrelevant to any matter which it was within the competence of the Court to determine. For these reasons I am of opinion that the return was good, and that the respondent should have been remanded to custody."

The Court unanimously decided that the appeal should be allowed, and accordingly the suspected person was re-arrested and interned : *Lloyd v. Wallach*, (1916) 20 C.L.R., 299.

### Fixed Selling Prices of Goods During the War.

The War Precautions Act (No. 10 of 1914) as amended by the Act (No. 3 of 1916) authorized the making of certain regulations and orders by the Governor-General "prescribing and regulating" (*inter alia*) "the conditions" (including times, places and prices) of the disposal or use of any property, goods, articles or things of any kind. By an order of 10th April, 1916, the Governor-General determined the maximum prices which might be charged for flour and bread in the proclaimed areas. The appellant Farey, a baker, was convicted for selling bread in a proclaimed area, at a greater price than that so determined. He appealed to the High Court, impeaching the validity of this legislation. The High Court held, *per* GRIFFITH, C.J. and BARTON, ISAACS, HIGGINS and POWERS, JJ. (GAVAN DUFFY and RICH, JJ. dissenting) that the legislative powers of the Commonwealth Parliament conferred by section 51 (VI.) and (XXXIX.) of the Constitution include a power during a state of war to fix within limits of locality the highest price which during the continuance of the war, may be charged for bread, and the conviction was confirmed : *Farey v. Burvett*, (1916) 21 C.L.R., at p. 433.

In the course of his judgment, GRIFFITH, C.J. quoted the well-known passage from the judgment of MARSHALL, C.J. in the celebrated case of *McCulloch v. Maryland*, 4 Wheat., 316, at p. 421 :—

“ We admit, as all must admit, that the powers of the Government are limited, and that its limits are not to be transcended. But we think the sound construction of the Constitution must allow to the National Legislature that discretion, with respect to the means by which the power it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the Constitution and all means which are appropriate which are plainly adapted to that end which are not prohibited, but consist with the letter and spirit of the Constitution are constitutional.”

Applying these principals of construction the Chief Justice (Sir SAMUEL GRIFFITH) proceeded :—“ It is hardly necessary to say that the best security of Australia lies in success of the British Arms. Certainly any measure which may have the effect of tending to secure an adequate food supply to Great Britain during the war, and so increasing, or preventing the diminution of the resources of that part of the Empire, would be a measure tending also to the more efficient defence of the Commonwealth as a part of it.” . . .

“ The control of finance or trade may be the most potent weapon of war. One test, however, must always be applied, namely :—Can the measure in question conduce to the efficiency of the force of the Empire, or is the connection of cause and effect between the measure and the desired efficiency so remote that the one cannot reasonably be regarded as effecting the other. . . . History, as well as common sense, tells us how infinitely various the means may be of securing efficiency in war. Sumptuary laws have always been common war measures. No one would dispute that the regulation of the supply and price of food in a beleaguered city would be a proper, and might be a necessary, war measure. The legislative Act now in question is in substance a sumptuary law. . . . What could not rationally be regarded as a measure of defence in time of peace may be obviously a measure of defence in time of war . . . A law passed by the Commonwealth Parliament in time of profound peace prohibiting the accumulating of food stuffs could not be regarded as substantially an exercise of the defence power. In time of war the same act might well be made a capital offence.”

“ The Court may, I think,” said the Chief Justice, “ take judicial notice of the fact that the past season’s harvest was most

abundant, and that vast quantities of wheat, far exceeding the possible consumption of the Commonwealth, are awaiting export, while owing to the operations of war the supply of freight is deficient. It is obvious that for economical as well as other reasons the export of the surplus to the United Kingdom or the Allied Nations may be highly desirable for the more efficient prosecution of the war. It seems to follow that any law which may tend, with or without the aid of other measures to encourage such export may be conducive to the more efficient conduct of the war." *Per* GRIFFITH, C.J., 21 C.L.R., at pp. 441-442.

### **Legislative and Judicial Functions in Defence Matters.**

It was contended in the Fixing of Prices Case (*Farey v. Burvett*), (1916) 21 C.L.R., 443, that the necessity and desirability of any law passed in the exercise of the war powers of the Commonwealth were questions of fact by determination of the High Court in appeal. On this point the Chief Justice (GRIFFITH, C.J.) referred to the following passage in the judgment of MARSHALL, C.J. in *M' Culloch v. Maryland*, 4 Wheat., 316, at p. 423, also quoted by BARTON, J. in the *Jumbunna Case*, 6 C.L.R., 309, at p. 345 :—" Where the law is not prohibited, and is really calculated to effect any of the objects entrusted to the Government, to undertake here, to inquire into the degree of its necessity, would be to pass the line which circumscribes the judicial department and to tread in legislative grounds." " The Court," said the Chief Justice, " would not assume the function of determining whether the facts were, at the time when the Act was passed, such as to warrant the Parliament in exercising the defence power by passing it. Whether it was or was not authorized to do so must, so far as the authority depends upon facts, depend upon the facts as they appeared to it, of which we have not and cannot have any knowledge. In my opinion, there is no principle, and there is certainly no precedent which would justify a Court in entering upon such an inquiry if upon any state of facts the exercise of the legislative power in the particular way adopted could be warranted. If it appeared on the face of the Act that it could not be substantially an exercise of the defence power, different questions would arise. I am not prepared to say that it may not have some and some important, influence upon the successful conduct of the war. If the attack is transferred, as it must be, to the regulation, that is, if it is treated as a denial of the desirability of making it at the time when it was made the question though not formally

the same is the same in substance. The Act expressly designates the Governor-General as the person to determine that question of fact. How can this Court say that it will assume the function of revising his opinion? In this aspect of the case *Lloyd v. Wallach*, (1916) 20 C.L.R., 299, decided by this Court last year, is exactly in point, and is conclusive. For these reasons I am of the opinion that, since the existence of a state of war might under some circumstances create an exigency justifying the exercise of the power to legislate with respect to defence in the way in which it has been exercised by the Parliament and by the Governor-General, it is not competent for any Court to entertain the question whether the circumstances were in fact of such a character. In my judgment, therefore, the Act and the regulation are valid." *Per* GRIFFITH. C.J., 21 C.L.R., at pp. 443-444.

"The end," said BARTON, J., "being once found to be legitimate, that is, authorized by the Constitution, then, whether it is 'wise and expedient' to resort to the means proposed is, to adapt the words of GRAY, J., 'A political question to be determined by Parliament when the question of exigency arises and not a judicial question, to be afterwards passed upon by the Courts.' Quoting again from the judgment of MARSHALL, C.J. in *M' Culloch v. Maryland*, 4 Wheat., 316, at p. 423 :—'To undertake here to inquire into the degree of its necessity, would be to pass the line which circumscribes the judicial department, and to tread on legislative ground.'

"What is necessary in the control and disposal of this country's resources in food as well as in arms, ships and men, is a matter that can only be known by those who, as Government and Parliament, have the best knowledge of the facts relating to the strategy of the war and the conditions under which the people can be victorious. Such facts are not lightly disclosed beyond the eyes and ears of those who alone can determine the degree of necessity or fitness. For us to determine it would be to repeat a phrase already quoted 'to tread on legislative ground.'" *Per* BARTON, J., 21 C.L.R., at pp. 445-448.

"The Constitution as I view it," said ISAACS, J. "is not so impotent a document as to fail at the very moment when the whole existence of the nation it is designed to serve is imperilled. Let us first consider its bare words. By section 51, sub-section vi., the Imperial Parliament has committed to the hands of the General

Government of Australia, the power of legislating with respect to the naval and military defence of the Commonwealth, and it has added these words of great significance, 'and of the several States.' Not only has this legislative power been placed in the hands of the Commonwealth Parliament but its effective exertion has been made exclusive, because by section 114, the States themselves are forbidden, unless they have the consent of the Commonwealth Parliament, to raise or maintain any naval or military force; by section 119 the Commonwealth is commanded to protect every State against invasion. Besides the legislative power, there is the executive authority of the Commonwealth. These provisions carry with them the royal war prerogative, and all that the common law of England includes in that prerogative so far as it is applicable to Australia. The creation of a state of war and the establishment of peace necessarily reside in the Sovereign himself as the Head of the Empire, but apart from that the prerogative powers of the Crown are exercisable locally. The full extent of the prerogative it is not necessary now to define, but it is certainly great in relation to the national emergency which calls for its exercise as may be seen by reference to *Chitty on the Prerogative of the Crown* (pp. 49 and 50). The only importance of it now is the fact that it is included in the Commonwealth powers and indicates the completeness of authority vested. Superadded to all this, section 51, sub-section (xxxix.), which enables the Parliament to legislate as to all matters incidental to the execution of the legislative powers of the Parliament itself, and of the executive power of the Crown. So that by the very words of the Constitution there is vested, in the most ample and absolute terms, in the Commonwealth, the full power and duty of taking every measure of defence which the circumstances may require as they present themselves to the proper organs of Government, to protect this Continent from foreign aggression, for maintaining its freedom—always under the British Crown—and, in short, for preserving its very existence as a unit of the Imperial Family of Nations: . . . I do not hold that the Legislature is at liberty wantonly and with manifest caprice to enter upon the domain ordinarily reserved to the States. In a certain sense and to a certain extent the position is examinable by the Court. If there were no war and no sign of war the position would be entirely different. But when we see before us a mighty and unexampled struggle in which we as a people, as an indivisible people, are not spectators but actors when we, as a judicial tribunal can see beyond the con-



troversy that co-ordinated effort in every department of our life may be needed to ensure success and maintain our freedom, the Court has then reached the limit of its jurisdiction. If the measure questioned may conceivably in such circumstances, even incidentally, aid the effectuation of the power of defence, the Court must hold its hand and leave the rest to the judgment and wisdom and discretion of the Parliament and the executive it controls, for they alone have the information the knowledge and the experience and also by the Constitution, the authority to judge of the situation and lead the nation to the desired end. Certain facts are before the Court by admission ; others are notorious. I do not enter into the circumstances further than to perform my duty as I have stated it. As to the desirability or wisdom of the regulation complained of it is not my province to speak, but as a matter of law I have no hesitation in holding that such a regulation is one which, as a defence regulation, is within the competency of the Legislature in the condition of affairs that now exist." *Per* ISAACS, J., 21 C.L.R., at pp. 432-435.

Mr. Justice HIGGINS said :—" Now I have taken a view which I have sometimes expressed in this Court (see *Baxter v. Commissioners of Taxation, New South Wales*, 4 C.L.R., 1087, at pp. 1165 *et seq.*, that in the famous decision of *M'Culloch v. Maryland*, 4 Wheat., 316, MARSHALL, C.J. pushed the doctrine of implied powers and implied prohibitions beyond legitimate bounds. But the present is not a case of implication ; it is a question as to the interpretation of an express power. What is the ambit of the power ? Not merely to make laws for the control of the forces, but to make laws (not for, but) ' with respect to ' naval and military defence and to matters incidental to that power and the powers of the Government ? All the subjects for legislation in section 51 are on the same logical level ; there is no hierarchy in the powers, with the power as to defence on the top. But, from the nature of defence the necessity for supreme national effort to preserve national existence the power to legislate as to defence although it shows itself on the same level as the other powers, has a deeper tap-root, far greater height of growth, wider branches and overshadows all the other powers. Defence—naval and military defence—is primarily a matter of force, actual or potential ; the whole force of the nation may be required ; and for the purpose of bringing the whole force of the nation to bear, the policy of the States may

have to be temporarily superseded ; the law made under the Federal Constitution prevailing (section 109). The temporary suspension of the policy of a State may possibly help to prevent the total and permanent paralysis of the State's policy and functions and of the State itself, under foreign invasion and domination. . . . The appellant's counsel urge that it is for this Court to decide whether the military necessities now existing are sufficient to justify the Act—or, as finally stated, whether this Act is capable of being a defensive Act in the circumstances of the country. In my opinion this is not our function. As MARSHALL, C.J. said in *M' Culloch v. Maryland*, 4 Wheat., 316 'The degree of necessity for any Congressional enactment or the relative degree of its appropriateness, if it have any appropriateness, is for consideration in Congress not here.' As was said in *Knox v. Lee*, 12 Wall., 457, at p. 531 :—'The judiciary should presume until the contrary is clearly shown, that there has been no transgression of power by Congress.' As HOLMES, J. said in *Missouri &c. Railway Co. v. May*, 194 U.S., 267, at p. 270, 'it must be remembered that Legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the Courts.' As was said by the Court in the *Legal Tender Case* (*Juillard v. Greenam*), 110 U.S., 421, at p. 450) :—'The question whether at any particular time in war or in peace the exigency is such, by reason of unusual and pressing demands on the resources of the Government or of the inadequacy of the supply of gold and silver coin to furnish the currency needed for the uses of the Government and of the people, that it is, as matter of fact, wise and expedient to resort to this means, is a political question to be determined by Congress when the question of exigency arises, and not a judicial question to be afterwards to be passed upon by the Courts.' 'We have not in this Court the evidence we have not even the means of compelling the Ministers to state the information on which they or Parliament acted. If we attempted the function of determining whether the circumstances of the country and the military necessities are such as to justify this Act we should be trespassing on legislative ground.' Per HIGGINS, J., 21 C.L.R., at pp. 457-460.

The judgment of the Court was concurred in by POWERS, J. and dissented from by GAVAN DUFFY and RICH, JJ., who held that the power to fix the price of bread in Melbourne and its suburbs at that time was not in any sense conducive to the defence of the Commonwealth, nor had it any relations whatever to the progress

of the war. "If we are wrong, and such a power be necessary now, or if it becomes necessary in the future, it can be exercised by the States or delegated by the States to the Commonwealth. It is a gross and pernicious error to propose that in the conduct of the present war the interests of the States and the Commonwealth are diverse; they are identical, and the people of Australia will no doubt be as willing to protect and forward those interests through their State Legislatures as through the Commonwealth Parliament. In our opinion the order should be made absolute quashing the conviction": (1916) 21 C.L.R., at pp. 467-468.

### **Australian Military Forces—Peace Footing.**

In the quarter ending 30th June, 1914, on the eve of the great war, the Commonwealth of Australia was possessed of a legally constituted, highly organized and well-officered defence force. It consisted of permanent men and militia, including light horse, field artillery, garrison artillery, engineers and infantry. In actual strength it was composed of 45,600 men, whilst its establishment was equal to 57,700 men, in addition to which there were reserves consisting of 48,000 in rifle clubs and 86,000 in senior cadets.

This force formed the foundation and nucleus of a fine citizen army, capable of growth and expansion and having all the attractive and cohesive strength of an army in being, bound together by law having its maintenance, discipline, and reinforcement secured by law.

It must be remembered also that during the first 14 years of Commonwealth history the military and patriotic spirit in Australia had been developed and received a great impulse, first from the voluntary defence system and the preparation and training carried out under the BARTON-FORREST legislation of 1903 as well as from the compulsory training system introduced by the DEAKIN-COOK laws of 1909.

The combined operation of these two systems must have turned out thousands of young Australians imbued with the military spirit and prepared for active military service. Many had passed through the ranks and afterwards became part of a natural and valuable reserve force to which an appeal could be made in the hour of need and danger. The following table prepared by the Defence Department and placed at the writer's disposal for this work by Senator RUSSELL, the Acting Minister of Defence, shows the establishment and strength of the Australian Military Forces at the declaration of war on 3rd August 1914.

**Establishment and Strength—Australian Forces.**

A return of the establishment and strength of the Australian Military Forces and Senior Cadets during the quarter ended 30th June, 1914, is as follows :—

Description of Corps, &c.	Establishment. Total.	Strength. Total.
<b>PERMANENT.</b>		
Administrative and Instructional Staff ..	1,033	882
Royal Military College (Staff) ..	51	43
Royal Military College (Staff Cadets) ..	147	147
Royal Australian Field Artillery ..	347	282
Royal Australian Garrison Artillery ..	862	797
Royal Australian Engineers ..	278	213
Australian Survey Corps ..	30	13
Australian Army Service Corps ..	199	164
Australian Army Medical Corps ..	43	38
Australian Army Veterinary Corps ..	11	5
Ordnance Department ..	268	259
Pay Department ..	67	60
Armament Artificers ..	40	31
Rifle Clubs and Rifle Range Staffs ..	76	55
<b>Total .. ..</b>	<b>3,452</b>	<b>2,989</b>
<b>MILITIA.</b>		
Area Officers .. ..	217	215
Light Horse .. ..	9,191	6,964
Field Artillery .. ..	2,704	2,273
Garrison Artillery .. ..	1,125	826
Engineers (Field Companies) .. ..	780	662
Engineers (Signal Troops) .. ..	180	162
Engineers (Signal Companies) .. ..	610	481
Engineers (Fortress Companies) .. ..	659	518
Infantry .. ..	35,773	27,814
Australian Intelligence Corps .. ..	74	54
Australian Army Service Corps .. ..	990	831
Australian Army Medical Corps .. ..	1,795	1,720
Australian Army Veterinary Corps .. ..	45	27
Australian Flying Corps .. ..	..	..
<b>Total .. ..</b>	<b>54,143</b>	<b>42,547</b>
<b>VOLUNTEERS.</b>		
Australian Army Nursing Service .. ..	108	101
Australian Automobile Corps .. ..	..	31
<b>Total .. ..</b>	<b>108</b>	<b>132</b>
<b>TOTAL PERMANENT, MILITIA, VOLUNTEERS</b>	<b>57,703</b>	<b>45,668</b>
Engineers and Railway Staff Corps ..	58	46
Unattached List .. ..	..	266
Chaplains .. ..	..	187
Reserve of Officers .. ..	..	1,001
Rifle Clubs .. ..	..	48,231
Senior Cadets .. ..	2,882	86,698
<b>GRAND TOTAL .. ..</b>	<b>..</b>	<b>182,097</b>

The difference between the columns headed " Establishments " and " Strength " indicates the number required to complete the full establishment. It will be seen from the foregoing table that the Australian Military Forces contain units and representatives of the various branches of military work and usefulness.

### AUSTRALIA IN THE GREAT WAR.

It is in the arena of defence and in the operations in which the Naval and Military Forces of Australia participated in the great war. for the defence of the Empire, civilization and human liberty at large, that the sovereign power of the Commonwealth has been made manifest. Whatever complaints may have been made as to the limitations of some Commonwealth powers it cannot be suggested that there is any deficiency in the defence power. As illustrated in the war now closed, it stands forth in glittering armour, in full panoply, unlimited and without restriction. There can be no doubt as to the constitutional power of the Commonwealth to organize fleets and armies, either by voluntary enlistment or by compulsory process to fight for the defence of the Commonwealth in any part of the world.

Bare legislative enactments and executive regulations which have been herein given in detail can give no adequate idea of the transcendent power of defence ; it can be seen only in laws materialized in the form of fleets and armies, sailing forth from the southern Continent in teeming Argosies, dotting the surface of the seas, covering the waste tracts of ocean and pouring into the harbours of Egypt, Mesopotamia, Gallipoli, Salonica, England, France, and Belgium. It is in these demonstrations of power and patriotism, man power, machine power, money power, food power, that the might of the new-born Commonwealth was made manifest to an astonished world and the record was told that will be emblazoned in history for all time. We see the awakening of a new-born Nation. We see once more the vision pictured by John Milton, the Puritan bard in describing England of the seventeenth century.

*" Methinks I see in my mind a noble and puissant nation rousing herself like a strong man after sleep, and shaking her invincible locks : methinks I see her as an eagle mewing her mighty youth and kindling her undazzled eyes at the full midday beam."*

The England that Milton saw was that little island in the North Sea, secure within her ocean frontiers, which had just received

her revolutionary baptism of fire and became, for awhile, known as the "Free Commonwealth," from which Australia has taken its name. Profound, as was his prescience, peering into the future, he could not foretell that subsequent expansion of England beyond her sea-girt limits and the establishment of new Britannias and new British realms beyond the seas. He knew nothing of the United States of America., the Indian Empire, Dominion of Canada, the Commonwealth of Australia, the Dominion of New Zealand and the Union of South Africa. The reality of nobility and puissance was more magnificent than the dream. That "noble and puissant Nation" became a family of nations under the British Crown, the most of whose members sprang from the same loins, the same cradle, from the same ancient home, the British Isles. From that cradle and home, they went forth in swarms, like bees from the mother hive, to found new settlements in distant lands, scattered all over the habitable surface of the globe. The old race, the old stock, did not suffer by the change of scene and environment. It gained new energy and fresh vitality in the new regions where the pioneers of British colonization built their new homes beneath western and southern skies.

Indeed, it became an aphorism of history that British colonies were more intensely English than the English, having the tenderest attachment to the country whence they sprang and the Sovereign presiding over the Empire, the supreme representative of Imperial unity.

The time came when the loyalty of these oversea Colonies, Provinces, and Dominions, was to be called upon to suffer the severe test of duty and sacrifice and when that time came, the people of those countries, without any special appeal for help, responded to the call of the blood, the call of affection and gratitude for all that they owed to the mighty Mother.

The story of Australia's entry into the Great War is recorded in the official history compiled by the Commonwealth Defence Department, which has been placed at the disposal of the writer, and from which the following condensed notes are taken :—

#### **The First Division, A.I.F.**

On the 3rd of August 1914 the Governor-General on the advice of the COOK-MILLEN Administration sent the following cable to the Imperial Government :—

“ In the event of war . . . prepared to despatch Expeditionary Force of 20,000 men of any suggested composition to any destination desired by Home Government. Force to be at complete disposal Home Government. Cost of despatch and maintenance would be borne by this Government.”

On the 6th August the Governor-General received the following reply :—

“ His Majesty’s Government gratefully accept offer of your Ministers to send force of 20,000 men to this country, and would be glad if it could be despatched as soon as possible.”

The Commonwealth Government cabled :—

“ We fully expected 20,000 men to go, and have begun organizing division on that basis on Home regular army establishments with three brigades of four-gun batteries, but without howitzer brigade and heavy battery. We are also organizing Light Horse Brigade on Australian establishments, namely, 2,226 *personnel* and 2,315 horses. We anticipate men embarking in four to six weeks.”

To this the Imperial Government replied on the 9th August :—

“ His Majesty’s Government will be glad to avail themselves of the offer of your Government of one Division and of one Light Horse Brigade.”

Invitations for volunteers to enlist in the Australian Imperial Force were issued on 11th August, and the Imperial Government was advised on the same day as follows :—

“ Arrangements being made for despatch of Expeditionary Force to England in accordance with your telegram of 9th August.”

Such were the preliminary steps taken to form and despatch the First Expeditionary Forces to the seat of war. It was decided that the Division should be placed under the command of Sir W. T. BRIDGES, K.C.B., C.M.G., the then Inspector-General of the Australian Military Forces, and that it should consist of units laid down in British War Establishments, 1914 (but with three Field Artillery Brigades only), while the establishments of the units were those

detailed in Australian War Establishments, 1912. The units and establishments of the Light Horse Brigade were in accordance with Australian War Establishments, 1912.

It was fully anticipated that the 1st Division and 1st Light Horse Brigade, comprising the 1st Convoy of the Australian Imperial Force, would be ready to sail in September, but, owing to uncertainty as to the exact location of German warships, it was considered advisable that they should not sail until a strong escort was available. There has been conjecture by the public as to whether there was some other reason for the delay, but it can be definitely stated that it was the proximity of German warships to Australia and New Zealand which was responsible.

Twenty-eight transports were employed to carry the Australian force, and it took a further ten to accommodate the New Zealanders. These loaded up at different ports, and only at Albany were they seen together. King George's Sound was the rendezvous appointed and between 24th and 28th October they assembled. The fleet of transports comprised some of the largest and finest commercial steamers trading with Australia, and they came from all the States of the Commonwealth, as well as from New Zealand.

The fleet of transports left Australia on Sunday, 1st November, 1914, at 5.45 a.m. At that hour H.M.S. *Minotaur* left the harbour, followed by H.M.A.S. *Melbourne*. The *Minotaur* took the lead. The *Orieto* then left her anchorage in the Sound and was followed by the transports in order, each line being taken in turn. The last boats to leave were the New Zealand transports, which went out in three lines. The Australian division proceeded out to sea, and then abruptly turned and went west, and it was 10 o'clock before the last ship disappeared from view.

The Naval escort consisted of :—

H.M.S. *Minotaur*, Flagship of the China Station. Cruiser.

H.I.J.M.S. *Ibuki*, Japanese cruiser.

H.M.A.S. *Sydney* and H.M.A.S. *Melbourne*. cruisers, of the Royal Australian Navy.

H.M.S. *Psyche* and H.M.S. *Pyramus*, light cruisers, of the New Zealand Squadron.

The Force, together with the New Zealand Expeditionary Force, landed in Egypt early in December, for the defence of that country, and to undergo war training in the vicinity of Cairo.



A cable was received as follows :—

“ It has been found advisable to disembark Australian Contingent in Egypt to assist in its defence and to complete their training. When this is completed they will go direct to the front to fight with other British troops in Europe.”

This was three weeks after the convoy sailed, and on the 2nd December, 1914, advice was received that the Australian and New Zealand contingents were landing in Egypt. Australia therefore landed 20,000 troops, fully equipped in every respect, in less than four months after the outbreak of war in a war zone, over 7,000 miles from the place of embarkation.

On the 26th November, 1914, advice was received that Major-General Sir William Birdwood (Indian Army) had been appointed to command the Australian and New Zealand Forces.

Subsequently these Forces were formed into the “ Australian and New Zealand Army Corps,” consisting of the “ 1st Australian Division,” under the command of Major-General Bridges, and the “ Australian and New Zealand Division,” commanded by Major-General Sir A. J. Godley. The latter Division was composed of the 4th Australian Infantry Brigade and the New Zealand Infantry Brigade, while the Australian and New Zealand Mounted Brigades were attached.

On the 10th August, 1914 (Cook-MILLEN Administration), an Expeditionary Force of 1,500 men was organized by the Commonwealth Government and despatched on merchant cruisers carrying 4.7 inch guns to seize German wireless station at New Guinea, Yap, Marshal Island and Nauru in Pleasant Island. Instructions were given to hoist the British Flag, and make arrangements for temporary administration, but no territory was to be formally annexed, this being a matter for settlement at the end of war. The capital of German New Guinea was captured on 12th September, 1914, but not without loss of life and other places were as a consequence occupied, thus making the expedition completely successful.

Later on the Commonwealth Government provided a line of communication units complete with transport and equipments amounting to 2,000 men and about 150 motor lorries and 150 horse waggons.

On the 3rd September, the Commonwealth Government (Cook-MILLEN) arranged for the despatch early in November of another Infantry Brigade and a Light Horse Brigade, total 6,383, with 2,386 horses and 181 vehicles. These were in addition to the first Expeditionary Force of 20,000 with reinforcements from time to time.

The foregoing new units and reinforcements with four small veterinary units, numbering 258 (these are all shown on A.I.F. table No. 2), made up about 10,000 men, and, with the exception of the Reserve Park and the Army Pay Details, which left with the 1st Convoy, they formed the 2nd Convoy, and left Australia at the latter end of December, 1914.

After the departure of the 2nd Convoy, as the seas were clear of the enemy, the system of despatching troops in convoys was discontinued.

Later on additional infantry brigades, light horse brigades, signal troop, brigade train and field ambulance were despatched.

The Australian Force then consisted of one division, three infantry brigades and four light horse brigades.

In May 1915 (FISHER-HUGHES-PEARCE Administration), a unit of aviators and necessary mechanics for service in the Tigris Valley, Mesopotamia, was embarked.

A bridging train to be manned by naval ratings drawn from the ranks of the Royal Australian Naval Reserve, was supplied.

A seige Artillery heavy brigade for service in Europe was offered and accepted.

Reinforcements to replace wastage in cavalry and infantry were sent in regular series.

### **The 2nd Australian Division.**

In July, 1915, the Commonwealth (FISHER-HUGHES-PEARCE) Government suggested the constitution of a second Australian division out of three Australian infantry brigades then in Egypt under the command of Brigadier-General Legge and offered to organize the necessary divisional troops. Thus the 2nd Australian division was constituted. Then followed the formation of other units, viz., the postal unit, the printing section, re-mount units, mining corps, including tunnelling companies and flying aviation squadrons.

### 3rd 4th and 5th Divisions.

On the 28th January, 1916, the following cablegram was received from the Imperial Government :—

“ As a result of communications with the General Officer Commanding in Egypt, and on further consideration of offer of the Commonwealth Government, conveyed in your telegram 26th November, to provide three additional Australian Divisions, less artillery and certain head-quarters units, War Office suggest that as there is at present in Egypt large accumulation of Australian and New Zealand *personnel* surplus to the establishment existing divisions, the formation of two of the three additional Australian Divisions should be begun in Egypt at once.”

On 2nd February, 1916, the following intimation of acceptance of the proposal was despatched by the HUGHES-PEARCE Administration :—

“ Your cable 28th January detailed proposal to form two Divisions in Egypt and one in Australia accepted. Australia can supply *personnel* required, but Artillery will be untrained.”

General Birdwood was also informed to this effect on the same date.

The formation of the 4th and 5th Australian Divisions from the accumulated *personnel* in Egypt was carried out in that country. It may be observed, in explanation of the accumulation of reinforcements in Egypt at this time, that the evacuation of Gallipoli at the end of the year had considerably reduced the demands upon the reinforcements available in Egypt, and, in addition, the large special reinforcements despatched from Australia in October and November, 1915, were just then arriving.

Advice was also received early in March, 1916, that the 1st, 2nd and 3rd Australian Light Horse Brigades and the New Zealand Mounted Rifle Brigade had been formed into the “ Anzac ” Mounted Division, with Major-General H. G. CHAUVEL, C.B., C.M.G., in command.

In October, 1916, approval was given for the organization of two Camel Battalions, each consisting of four Australian and one

New Zealand Company, the designation of these units being "1st and 2nd "Anzac" Section, Imperial Camel Corps.

Owing to the increase in Camel Force requirements in Egypt, approval was given for 11th and 12th Light Horse Regiments to be mounted on camels without changing their organization.

On 17th August, 1916, the following cablegram was received from the A.I.F. Head-Quarters, London :—

"Insufficiency of reinforcements especially pressing owing to recent casualties causing War Office anxiety. As sufficient not immediately available from training centres, War Office decided to borrow shortage from 3rd Division now training here. Alternative proposal discussed by War Council was to disband 3rd Division, dividing members among other Divisions . . . ."

A cablegram was despatched by the Commonwealth Government (HUGHES-PEARCE) in which the desire was expressed that the 3rd Division should not be broken up, and on 31st August the Imperial Government was informed that the special draft of 20,000 men and increased reinforcements, amounting to 16,500 men per month, would be forwarded.

The official record goes on to say that the Army Council took a very serious view of the situation. It was after the receipt of these cablegrams that the Commonwealth (HUGHES) Government decided to take a referendum of the people to decide whether any shortage in the number of volunteers coming forward should be made good by the compulsory enlistment of single men. The people, however, having decided against the Government's proposals, the following cablegram was despatched on 11th November, 1916 :—

" . . . . Not possible now to provide the 20,000 nor large reinforcements promised. Suggest 3rd Division be retained in England for present. . . ."

A reply was received, dated London, 16th November :—

" . . . . 3rd Division must proceed to France, November 21st, as already arranged. To cancel this decision would seriously interfere with plans in progress.

“ Army Council therefore urge that no effort be spared to maintain adequate reinforcement for five Divisions, even if it be not feasible to provide whole or part of 20,000 special draft.”

The second referendum held in December, 1917, was also decided in the negative. These two decisions constitute grave blots on what would otherwise have been an undimmed record of Australian patriotism and national glory.

This summary of Australia's military contribution may be closed with the statement that the total embarkation of troops up to 31st December, 1918, was 329,682 men.

The following statement, dated January, 1919, shows the expenditure incurred in connection with the Australian Imperial Forces in Australia and overseas from the year 1914-15 to the end of the year 1918 :—

Financial Year.	Expenditure in Australia.	Expenditure Abroad. Total
1914-15 .. ..	£8,576,202 .. ..	£1,786,938
1915-16 .. ..	24,731,127 .. ..	7,558,397
1916-17 .. ..	33,243,035 .. ..	36,813,121
1917-18 .. ..	34,426,397 .. ..	36,605,990
1918-19 (from 30/6/18 to 30/11/18—five months)	10,045,455 .. ..	17,517,116

The figures embodied in this statement give an idea of the enormous increase in the responsibilities of the Minister for Defence and the burdens of the people since the commencement of the war.

## § 55. “NAVAL DEFENCE.”

### LEGISLATION.

#### NAVAL AGREEMENT 1887.

#### NAVAL AGREEMENT (BARTON) ACT 1903

Before the year 1887 the several Colonies of Australasia had made some modest provision for naval defence in the shape of gun-boats, torpedo-boats and small cruisers. In that year an agreement was arrived at by the Australian Colonies and New Zealand, with the Admiralty for the supply and maintenance, of an auxiliary squadron in the Australasian seas. According to the terms of this agreement, which was ratified by the Colonial Legislatures between

1887 and 1891, a naval force additional to the British war vessels of the Australasian station, was to act as auxiliary squadron. The total annual contribution of the Colonies towards this new naval force was to be £126,000 (at most) and the agreement was to last for ten years.

On the Federation of the Australian Colonies in 1901, a new naval agreement was considered necessary and in 1902 an Imperial Conference was held in London at which Sir EDMUND BARTON represented the Commonwealth and an amended agreement was arrived at, and its acceptance was recommended to the Commonwealth Parliament by the BARTON Ministry. This important contract involving high policy began with a recital that the parties thereto recognized "the importance of sea power in the control which it gives over sea communications, the necessity of a single navy under one authority, by which alone concerted action can be assured, and the advantages which will be derived from developing the sea power of Australia and New Zealand."

It was agreed that there was to be a new naval force on the Australasian station consisting of sea-going warships, including one armoured cruiser (first class) and of a Royal naval reserve of 725 officers and men. The base of this force was to be the ports of Australia and New Zealand and the sphere of operations was to be the oceans adjacent to Australia, New Zealand, China, and the East Indies. The Admiralty was to provide the necessary force and equipments together with drill ships, officers and men, but the drill ships and one other ship were to be manned by Australians and New Zealanders as far as procurable. In consideration of this service Australia and New Zealand agreed to pay the Imperial Government five-twelfths and one-twelfth respectively of the total annual cost of maintaining the naval force on the Australian station, provided that the payment to be made by each should not exceed £200,000 and £40,000 respectively in any one year. This agreement having been ratified by Parliament continued in force until it was superseded by a new plan of Australian naval defence.

#### COAST AND HARBOUR DEFENCE APPROPRIATION (DEAKIN) ACT 1908.

In June 1908 the Commonwealth Parliament on the advice of Mr. DEAKIN, then Prime Minister, passed an Act appropriating out of surplus revenue, the sum of £250,000 for coastal and harbor

defence purposes. Mr. DEAKIN gave a promise that none of this money should be spent until Parliament was informed of the details of the proposed scheme. Subsequently, when the FISHER Government came into power they declined to be bound by Mr. DEAKIN's promise to Parliament, and entered into contracts for the construction and supply of three destroyers of the Australian River type, which were afterwards known as the *Yarra*, *Paramatta* and the *Warrego*.

#### NAVAL AGREEMENT (PEARCE) ACT 1912.

In July 1909, a naval conference was held in London, convened by the Imperial Defence Committee, at which Australia, Canada, New Zealand and South Africa were represented. One of the arrangements arrived at by this conference was that the Commonwealth should, in place of the subsidy, supply an Australian fleet unit to consist of:—one armoured cruiser (*New Indomitable* class), three unarmoured cruisers (*Bristol* class), six destroyers (*River* class), three submarines (C. class); also the necessary auxiliaries, such as docks and depot ships. The cost of construction at English prices would be about £3,700,000 and the estimated annual cost about £750,000. Of this sum the Imperial Government offered to contribute £250,000 but at a later date the Commonwealth Government decided to bear the whole cost. It was agreed that the annual subsidy of £200,000 payable by the Commonwealth to the Admiralty would continue to be paid up to the time when the then existing Imperial Squadron in Australian waters should be relieved by the new Australian fleet unit; it would then cease.

The Naval Agreement arrived at in London at the Imperial Naval Conference in 1909 was at once acted on and was afterwards ratified by the Commonwealth Parliament in the Naval Agreement Act 1912 in the following words:—"The Naval Agreement Act 1903 is amended by adding, after section 3, the following section:—The Governor-General may, from time to time, arrange with the Imperial Government for the reduction of the Naval Force to be provided under the agreement on the Australian station, and for a reduction in the amount of the subsidy payable under the agreement by the Commonwealth, and for any alteration of the agreement to give effect to any such arrangement. The provisions of this section shall extend to authorize any arrangement already entered into for any of the purposes mentioned in this section."

## NAVAL LOAN (DEAKIN) ACT 1909.

This Act passed by Parliament on the advice of the DEAKIN-COOK Administration, authorized the borrowing of £3,500,000 for the purpose of establishing the nucleus of an Australian Fleet Unit. It was, however, never brought into force, being repealed on the motion of the FISHER Administration in 1910.

## NAVAL DEFENCE (PEARCE) ACT 1910-11-12.

The Naval Defence Act 1910, as amended by the Acts of 1911 and 1912, consolidated the naval provisions of the Defence Acts 1903-11 and made arrangements for the organization, discipline and development of a new naval force of the Commonwealth.

The Governor-General may raise, maintain, and organize such naval forces as he deems necessary for the defence and protection of the Commonwealth and of the several States.

The Naval Forces are divided into two branches called the Permanent Naval Forces and the Citizen Naval Forces. The Permanent Naval Forces consist of officers who are appointed officers of those Forces, and seamen who have enlisted or engaged as members of those Forces and who are bound to continuous naval service for the term of their enlistment or engagement. The Citizen Naval Forces are divided into the Naval Reserve Forces and the Naval Volunteer Reserve Forces. The Naval Reserve Forces consists of officers and seamen who are not bound in time of peace to continuous naval service and who are paid for their services as prescribed.

Except as provided in the Defence Act, the Naval Forces shall be raised and kept by voluntary enlistment only. Enlistment in the Naval Forces shall be for such period as is prescribed, but no prescribed period shall be less than two years. The Permanent Naval Forces are liable to continuous naval service, and shall at all times be liable to be employed on any naval service, including active service, and the defence and protection of the Commonwealth and of the several States.

The Citizen Naval Forces are not liable in time of peace to continuous naval service, but are liable to such naval service as the regulations prescribe. The Citizen Forces shall only be liable to be employed on active service when called out for active service by proclamation.



Members of the Naval Forces may be required to serve for training or for naval service either within or beyond the limits of the Commonwealth. The Naval Forces shall be subject to such drill training and inspection as are prescribed by the regulations.

The Governor-General may, for the purpose of naval service or training, place any part of the Naval Forces on board any ship of the King's Navy or in any naval training establishment or school in connexion with the King's Navy. The members of the Naval Forces while so placed shall be under the command of the officer commanding the ship, training establishment, or school; and be subject to the laws and regulations to which the members of the King's Naval Forces on the ship or attending the training establishment or school are subject.

The Naval Discipline Act and the King's Regulations and Admiralty Instructions for the time being in force in relation to the King's Naval Forces shall, subject to this Act and to any modifications and adaptations prescribed by the regulations, apply to the Naval Forces.

Whenever the Commonwealth Naval Forces or any part thereof are acting with any part of the King's Naval Forces and any part of the Naval Forces or any part of the King's Dominions, or with any part of any of those Forces, then, subject to any order made by the Governor-General, the Forces so acting together shall, while so acting, be deemed to be one force or unit of a force in command of the senior naval officer present and acting in a position of command, and, subject to his orders, all officers in the force or unit shall have as regards command and discipline in relation to the Commonwealth Naval Forces, the same powers and authority as if they were officers of the Commonwealth Naval Forces.

Where any arrangement has been made between the Government of the Commonwealth and the Government of the United Kingdom or the Government of any part of the King's Dominions in relation to any joint action or mutual action in relation to training or service by the Naval Forces of the Commonwealth and the Naval Forces of the King and the Naval Forces of any part of the King's Dominions or any of those Forces, the Governor-General may, by order published in the *Gazette*, give such directions or instructions as he thinks fit to carry out the arrangement.

## AUSTRALIA AND SEA POWER.

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When in March 1898 the Federal Convention had completed its first draft of a Constitution to establish the Commonwealth of Australia, the *London Times*, ever foremost in its prescience of Imperial events, welcomed the dawning outlines of a new power in the Pacific in these memorable words:—"It will immensely increase the dignity and national life of the Australian Colonies, and practically create a new British power in the Pacific."

This stately passage gave the forecast that Australia, as an island continent, commanding a maritime position in the Southern Seas would not be content with mere exclusive self-contained insularity, but would aspire to hegemony and quasi-sovereignty over the islands of the Pacific. To gratify such an aspiration sea power was the essential condition.

Australia has not yet recognized its debt of gratitude to those naval officers, public men and press writers, who, in pre-Federal and early Commonwealth years, advocated a forward naval policy for Australia, including the acquisition and maintenance of a naval force of sufficient strength to participate in the defence of the Commonwealth and, in association and co-operation with the Imperial fleet, in the defence of the Empire. The advocates of such a bold policy, in those days, required courage to sustain their position, as at first, the idea of an Australian Navy was in certain quarters, not only ridiculed as being contrary to sound naval strategy, and branded as a "navy in a corner," but it was also denounced as disloyal and suggestive of separation. It was not at first understood that the real author of the suggestion was a distinguished British Naval Officer, who, at one time, occupied the position of Admiral in charge of the Australian station.

In the year 1885, when the great Russian war scare occurred, Admiral TRYON commissioned and armed two mail steamers to act as warships on the Australian trade routes. This showed the deficiency of the Australian squadron in these seas. Admiral TRYON was the first to suggest the establishment of a sea going Colonial fleet, consisting of six cruiser catchers, and eight torpedo boats, to be furnished, manned and maintained by the Admiralty at the cost

of the Colonies and to be located in Australian waters. In 1887, Admiral TRYON proposed a naval force to be managed by the Colonies in times of peace and to be under the Admiralty in time of war. These proposals resulted in the Naval Agreement of 1887-1891 by which Australian Colonies granted a subsidy of £126,000 to the Admiralty towards the up-keep of an auxiliary squadron in Australasian seas.

Admiral TRYON acquiesced in the subsidy, as a temporary measure only. In his public writings his views were expressed in the following words :—" It is not a mere subsidised force that will do what is wanted. It is not only money that is required to produce effective forces, but it is the personal service of our countrymen all over the World ; it is blood rather than gold, that is the basis of every true force ; and to awaken the true spirit, the Government of each Colony, the people of each Colony, should manage, as far as possible, their local forces during time of peace. Unless they do so the burden of cost will be irksome, and the interest of the people in their maintenance—which is a first factor for success—will not be evoked."

Admiral PENROSE FITZGERALD, in his *Life of Admiral Tryon*, published in February 1897, wrote :—" Whateyer the future may have in store for them (Australians)—federation, monarchy, republic, or some new and, as yet, unheard of form of government—it is certain that their extensive maritime interests will eventually require a powerful navy for their protection ; and it will be on record in the archives of the various Australasian Governments that Admiral TRYON had more to do with the initiation of that navy than any other man."

The importance and necessity of Australia participating in the sea power of the Empire was, shortly before, and after the establishment of Federation, strongly advocated by a small number of naval officers, public men and press writers. Public and official opinion was, at that time, apparently satisfied with the subsidy system, under which Australia had contributed the total sum of £2,401,774 and New Zealand gave £480,355 to the Admiralty towards the up-keep of the auxiliary squadron in Australasian waters. In course of time, however, opposition to the subsidy increased, and a number of daring men began to attack it and to advocate the adoption of an Australian Navy on the lines suggested by Admiral TRYON.

The public were reminded that Admiral TRYON was the first to support the personal participation of Australians in the work of naval defence, in preference to a money contribution.

A Naval Conference was held in Melbourne in August 1899 in which the following naval officers took part :—Captain W. R. CRESWELL, Naval Commandant, South Australia ; Captain FRANCIS HIXSON, Commanding New South Wales Naval Forces ; Commander F. TICKELL, V.N., Commanding Victorian Naval Forces and Captain R. M. COLLINS, Secretary for Defence, Victoria ; Commander WALTON DRAKE, Acting Naval Commandant, Queensland. Resolutions were adopted which called attention to the fact that there was every indication that the Pacific would play a part in the future, analogous to that of the Mediterranean in the past, as an arena of national contending forces. “ France, Russia and Japan have established naval bases, and possess powerful fleets in the seas to our north. Every consideration, both of defence and the position of influence of Australia as ‘ the new power in the Pacific,’ will demand from those responsible for the organization of Federal defence the recognition of the primary importance of naval provision.” The view gained ground that however convenient the subsidy system was, a cash nexus was not the most effective means of welding together the Empire.

Captain ROBERT COLLINS, at one time secretary for defence of the Colony of Victoria, and afterwards secretary for defence under the Commonwealth, published a valuable memorandum dated 27th September 1900 based on the report of the Naval Conference in in which he wrote :—“ So far, the Australian Colonies have established small local naval forces, costing in the aggregate about £65,000 a year, and they combine in a subsidy of £126,000 per annum to the Imperial Government for the maintenance of the Australian Squadron. When the Australian Squadron was first established it was understood in Australia that it would form the means of drilling and training Australian seamen, and thus develop Australian naval efficiency. This has not been the result. Thus, whilst the military defences of Australia have assumed some definite policy and organization, naval defences are embryonic and unorganized. But it is important to Australia, from her geographical position and her manifest maritime future, to develop her own local resources. This cannot be done if her naval defence is restricted to the payment of subsidies. A scheme for raising and maintaining

naval reserves available for service in Her Majesty's fleet requires to be matured. Provision would have to be made for suitable vessels at the chief colonial ports, on which the reserves could drill and periodically go to sea."

In 1902 Captain (afterwards Admiral) W. R. CRESWELL, C.M.G., then Naval Commandant of Queensland, proposed that the Commonwealth Defence Department should purchase four cruisers at a capital cost of £300,000 each, and man and equip them for the naval defence of the Commonwealth. This proposal, however, was not entertained by the Government. Then came the Imperial Conference in London and the Naval Agreement Act of 1903. Not discouraged by the failure of his first suggestion Captain CRESWELL, who in 1904 had become Director of the Commonwealth Naval Forces, in 1905 submitted another scheme for the purchase of three new cruiser destroyers to be used for open sea scouting and patrolling the trade routes, also 16 coastal destroyers and 15 torpedo boats.

In September 1906 another plan of Australian naval defence was formulated by Captain CRESWELL, C.M.G., This plan included three ocean going destroyers of the *Tartar* and *Afridi* type, 13,000 tons each, one ocean going destroyer of 800 tons; 16 coastal destroyers of the River Class and 4 first class torpedo boats of 157 tons each, to be associated with the British Navy in such a way that there could be periodical changes of officers and men for instructional purposes. Shortly afterwards Mr. DEAKIN, then Prime Minister, informed the House of Representatives that the Government intended to recommend the adoption of a portion of the scheme, viz., 8 coastal destroyers and 4 first class torpedo boats. These, he said, were the best tried, best known and most economical of the naval proposals that he was aware of.

In 1907 an Imperial Conference was held in England at which Mr. DEAKIN represented the Commonwealth Government. At that conference the Admiralty, represented by Lord TWEEDMOUTH, the First Lord, said the Dominions could either continue the naval subsidy, repeal the subsidy or supplement the subsidy by a local force of small craft destroyers or submarines. The Imperial Government, he said, would not press for contributions of men or money, but would welcome the co-operation of the Dominions in whatever

form they thought it was most desirable. This was indeed a great change in the attitude of the British Admiralty on the question of naval defence and co-operation.

Upon Mr. DEAKIN's return to Australia from the Imperial Conference, in December, 1907, he abandoned his proposals of September, 1906, and referring to the 1906 scheme he described it as an isolated little service which would never be progressive; he was impressed with the necessity of an Australian Naval Force when established, being on a larger scale and working more in unison with the British Fleet. Mr. DEAKIN proposed to enter into negotiations with the Admiralty for the provision and payment of 1,000 Australian seamen to serve in the British navy for training and instructional purposes. He also proposed an addition or supplement to the subsidy in the shape of 6 destroyers and 9 submarines to be provided, manned, maintained and controlled by the Commonwealth.

Parliamentary troubles, however, prevented Mr. DEAKIN giving effect to his plans and proposals, with one exception; in June 1908 he introduced a bill into the House of Representatives entitled the Coast Defence Appropriation Act, by which the sum of £250,000 was set aside out of surplus revenue and appropriated for the special purpose of Australian coastal defence. Mr. DEAKIN did not give full particulars of the proposed application of the vote which was carried unanimously in Parliament on the understanding that no money would be spent under this appropriation unless and until full particulars of the purposes and destination should be presented to Parliament. Shortly afterwards, namely, in November 1908, the second DEAKIN Ministry was defeated and retired from office; it was succeeded by the first FISHER Ministry which remained in office until the 1st June 1909. It was during the official career of this Labour Government that the famous *Dreadnought* agitation occurred in Australia under the following circumstances:—

The instinct of all Britishers in all parts of the world to defend their race and country in time of danger was strongly aroused throughout the Empire in the month of March 1909, caused by a statement made in the House of Commons by Mr. MCKENNA, First Lord of the Admiralty, that the naval supremacy of Britain was threatened by Germany. The House of Commons is not commonly a place of emotion, but it is said that after the speeches which explained the naval position at that momentous crisis there was a

pause, during which no one rose to speak and all sat mute and stunned beneath the weight of the most sensational announcement ever made in the House of Commons since the time of Napoleon Buonaparte: *The World's Work*, August 1909.

Mr. McKENNA's disclosure found nothing ready except an abstract desire that the Dominions should contribute in some form towards British naval power. Throughout the British Dominions the response was immediate and electrical. A great wave of patriotism swept over the British people, and a universal demand arose in favour of the reinforcement of the navy by colonial and over-sea assistance. The Dominion of New Zealand promptly made an offer of two *Dreadnoughts*; and a public movement in favour of a similar offer soon gathered momentum throughout the length and breadth of Australia. The FISHER Ministry, however, refused to support the movement in favour of Australia granting a *Dreadnought*. It was resolved to spend the sum of £250,000 appropriated by Mr. DEAKIN's Coast and Harbour Defence Act in coastal destroyers. Accordingly the FISHER Government sent orders to Great Britain for the preparation of designs and the construction of three destroyers to be known as the Australian River Class. Orders were given by the High Commissioner and the construction of the destroyers was commenced and prosecuted; they afterwards received the names of the *Yarra*, *Parramatta* and the *Warrego*.

The defects of Mr. FISHER's scheme were that it contemplated simply a local navy, and a local destroyer policy only. It had no reference to the British Fleet or Australia's participation in sea power. Mr. FISHER strongly denounced the *Dreadnought* proposal as "a mere spectacular display." He did not perceive that destroyers and submarines, such as came within his scheme, were mere small crafts and mere incidents of the main fleet. Referring to Mr. FISHER's scheme, *The Age* of the 23rd March, 1909, wrote:—"Mr. Fisher has failed to grasp the fact that our local navy would lose its *raison d'être* if Britain were to lose her naval pre-eminence in European waters. This is the great peril which faces the Empire at this moment and which must continue to menace the entire Imperial fabric until Britain's battleship efficiency is made supreme."

The DEAKIN-COOK Ministry succeeded the first FISHER Ministry and held office from 2nd June 1909 to 26th April 1910. On 6th June, immediately after its assumption of office, Mr. DEAKIN, the

Prime Minister of the new Fusion Government, sent a cablegram to the Imperial Government, offering a *Dreadnought* as Australia's gift to the British Navy, or naval assistance in any other form desired by the Imperial Government. On the 9th June a reply was received thanking the Commonwealth Government and cordially accepting the offer. Referring to these messages *The Times* wrote :—" Australia has the honor to be the second Dominion to offer a *Dreadnought*. The gratitude with which His Majesty's Government accepts the offer will be shared to the full by the whole nation, as well as by the citizens in the oversea Dominions."

The Imperial Government had, in the meantime, made arrangements for the convening and holding of a Naval Conference in England to consider the question of naval defence generally, and the share which the Dominions should take therein. At this conference the Commonwealth Government was represented by an honorary Minister (Colonel FOXTON of Queensland), who was accompanied by naval and military expert advisers. It was agreed, with the concurrence of the Admiralty that the then Naval Subsidy should be abolished and that instead thereof the Commonwealth of Australia should provide a fleet unit, consisting of an armoured cruiser of the *Indomitable* class, three unarmoured cruisers of the *Bristol* class, six destroyers of the improved "River" class, and three submarines of "C" class; since altered to two submarines of "E" class; also the necessary auxiliaries, such as docks and depot ships, for this fleet, which is to form a complete naval unit, and be one of the three divisions of the Eastern fleet. It was stated that the British Government might provide an addition to this fleet. The cost of construction at English prices would be about £3,750,000, and the estimated annual cost about £750,000. Of this sum the Imperial Government offered to contribute £250,000, but the Commonwealth Government decided to bear the whole cost.

The war ships actually ordered by the DEAKIN-COOK Ministry, in pursuance of this agreement, before they left office were, an armoured cruiser (now called a battle cruiser), which afterwards received the name of *Australia* and two smaller cruisers the *Melbourne* and the *Sydney*. The remaining elements of the fleet unit, including two submarines and three other destroyers, which received the name of the *Torrens*, *Swan* and *Huon*, were subsequently ordered by the second FISHER Ministry which took office on 27th



April 1910 and proceeded to loyally carry out the programme concurred in by the Admiralty.

Meanwhile the construction of the three destroyers ordered by the first FISHER Ministry namely, the *Parramatta*, *Yarra* and *Warrego* was proceeding. The *Parramatta* was built at Govan-on-Clyde, launched and christened 9th February 1910, commissioned September 1910, arrived in Australia December 1910. The *Yarra* was launched and christened at Dumbarton the 9th April 1910, commissioned in September 1910, arrived in Australian waters December 1910. The *Warrego*, built in Great Britain, was shipped to Sydney in parts and re-erected in the Government dockyard Cockatoo Island, christened and launched on the 4th April, 1911, commissioned on the 1st June, 1912.

The *Yarra* and *Parramatta* left Portsmouth on the 19th September 1910 on their voyage to Australia, manned by crews which had been sent from Australia to work them. The Admiralty loaned thirty ratings to furnish the complements. The Admiralty also arranged for the cruiser H.M.S. *Gibraltar* to sail to Australia in company with the destroyers. She accordingly kept in touch with the destroyers throughout the voyage; they arrived in Australian waters December 1910.

These destroyers are each of 700 tons displacement, with a length of 245 feet; beam of 24 feet 3 inches; draft, 8 feet 11 inches depth 14 feet 9 inches. They have turbines, water-tube boilers and oil fuel, and have a legend speed of 26 knots. The armament consists of one 4 inch 30-pounder, three 12 pounders, and three 18-inch deck discharge tubes for torpedoes. The radius of action at cruising speed is nearly 3,000 miles. The complement is 66 officers and men. Three other destroyers, the *Torrens*, *Swan* and the *Huon*, were built by the Commonwealth at Cockatoo, and two submarines of the "C" class were obtained from England.

The battle cruiser *Australia* ordered by the DEAKIN-COOK Ministry was placed in construction by the British Admiralty early in 1910; tenders being invited in January of that year. The first portion of the keel was laid on 23rd June 1910, the cruiser was launched on 25th October 1911; completed in November 1912; commissioned in June 1913, and arrived in Australian waters in September 1913. The ship is of the *Dreadnought* type; *Indomitable* class; about 19,200 tons, with turbine engines. Her speed is 26 knots, her armament eight 12-inch and sixteen 4-inch guns, and

five torpedo tubes. She has an 8-inch armour belt amidships, and a 4-inch belt at the ends. The estimated total cost of the vessel is £1,800,000.

The light cruisers afterwards named the *Melbourne* and *Sydney* were ordered by the DEAKIN-COOK Ministry in 1909 to be built in Great Britain. The keel of the *Sydney* was laid on the 11th February 1911, and that of the *Melbourne* on the 4th April 1911. Both these cruisers arrived in Australian waters in 1913.

The third cruiser, named *Brisbane*, was built at the Commonwealth dockyard in Sydney. Pending the completion of the *Brisbane* the Admiralty lent to the Commonwealth, from the Royal Navy, the cruiser *Encounter* for service in the Australian navy. In March 1913, the Admiralty presented to the Commonwealth the cruiser *Pioneer* for service in the Australian navy.

#### Admiral Henderson's Visit.

In the year 1910 the Fisher Government sent an invitation to Admiral Sir REGINALD HENDERSON to visit Australia and advise upon naval matters generally. His report submitted in 1911, after an inspection of the various Australian capitals the coast line and ports of the Continent, recommended the provision of fifty-two vessels and 15,000 men; expenditure on construction, works, etc., £40,000,000, with an ultimate annual naval vote of £4,794,000. Six naval bases, and eleven sub-bases, were recommended. The fifty-two vessels would consist of eight armoured cruisers, ten protected cruisers, eighteen destroyers, twelve submarines, three depot ships, one fleet repair ship and the construction would extend over twenty-two years. The annual cost of *personnel* would be £601,000 in 1913-14, and would increase to £2,226,000 in 1933-34. Annual cost of maintenance of ships in commission would be £262,000 in 1913-14, rising to £1,226,000 in 1933-34. Annual expenditure on construction and maintenance of ships would increase from £2,349,000 in 1913-14 to £4,824,000 in 1932-33. The strength of the fleet would be twenty-three ships in 1918, forty-eight ships in 1928, and fifty-two ships in 1933. In the earlier years portion of the crews would be obtained from Great Britain, but this would cease in the period 1923-28.

#### Australia's Share in Sea Power.

The Secretary of the Navy, Mr. MACANDIE, has, at the request of the author, kindly prepared for inclusion in this work, the two

following tables : one showing ships comprising the Royal Australian Navy at the outbreak of the Great War in August 1914, and the other showing the ships of the Royal Australian Navy commissioned since the commencement of hostilities. All of these vessels have shared in the naval defence of Australia and several of them have co-operated in actual fighting with the Grand Fleet of the Empire.

LIST OF SHIPS OF THE ROYAL AUSTRALIAN NAVY AT THE  
OUTBREAK OF WAR.

Vessel.	Description.	Displacement.	Power.
		Tons.	
<i>Australia</i> .. ..	Battle cruiser .. ..	19,200	44,000 h.p.
<i>Childers</i> .. ..	1st class torpedo boat .. ..	..	..
<i>Countess of Hopetoun</i> .. ..	1st class torpedo boat .. ..	..	..
<i>Encounter</i> .. ..	Light cruiser .. ..	5,880	12,500 h.p.
<i>Gayundah</i> .. ..	Gunboat .. ..	360	400 h.p.
<i>Melbourne</i> .. ..	Light cruiser .. ..	5,600	22,000 h.p.
<i>Parramatta</i> .. ..	Torpedo boat destroyer .. ..	700	12,000 h.p.
<i>Pioneer</i> .. ..	Light cruiser .. ..	2,200	7,000 h.p.
<i>Protector</i> .. ..	Gunboat .. ..	920	1,641 h.p.
<i>Sydney</i> .. ..	Light cruiser .. ..	5,600	22,000 h.p.
<i>Warrego</i> .. ..	Torpedo boat destroyer .. ..	700	12,000 h.p.
<i>Yarra</i> .. ..	Torpedo boat destroyer .. ..	700	12,000 h.p.
<i>A.E. 1</i> .. ..	Submarine .. ..	800	1,750 h.p.
<i>A.E. 2</i> .. ..	Submarine .. ..	800	1,750 h.p.

LIST OF SHIPS OF THE ROYAL AUSTRALIAN NAVY COMMISSIONED  
SINCE THE OUTBREAK OF WAR.

Vessel.	Description.	Displacement.	Power.	Date commissioned.
		tons.		
<i>Brisbane</i> .. ..	Light cruiser .. ..	5,400	25,000 h.p.	31st October 1916.
<i>Fantome</i> * .. ..	Sloop .. ..	1,070	1,400 h.p.	27th October 1917.
<i>Huon</i> .. ..	Torpedo boat destroyer .. ..	700	10,600 h.p.	14th December 1915.
<i>Kurumba</i> † .. ..	Fleet Auxiliary (Oiler) .. ..	—	—	—
<i>Mourilyan</i> † .. ..	Armed Patrol Vessel .. ..	1,349	—	23rd May 1918.
<i>Coogee</i> † .. ..	Armed Patrol Vessel .. ..	762	—	20th May 1918.
<i>Platypus</i> † .. ..	Submarine Depot Ship .. ..	3,478	2,650 h.p.	21st March 1917.
<i>Psyche</i> * .. ..	Light cruiser .. ..	2,135	5,000 h.p.	—
<i>Sleuth, late Ena</i> † .. ..	Patrol vessel .. ..	108	160 h.p.	17th December 1917.
<i>Swan</i> .. ..	Torpedo boat destroyer .. ..	700	10,600 h.p.	16th August 1916.
<i>Torrens</i> .. ..	Torpedo boat destroyer .. ..	700	10,600 h.p.	3rd July 1916.
<i>Una</i> (late <i>Komet</i> German Navy) .. ..	Sloop .. ..	1,438	1,350 h.p.	17th November 1914.

\* Lent from Royal Navy for war service.

† Lent to Royal Navy since date of commissioning for service in North Sea.

‡ Hired for war service.

A complete record of the history and establishment as well as the achievements of the Royal Australian Navy during the war would fill a large and interesting volume. In the following summary of its performances each paragraph gives a flashlight view of stirring work done by the Navy which would make thrilling passages in such a history.

- (1) Capture of Samoa,
- (2) Capture of German New Guinea,
- (3) Destruction of *Emden* by H.M.S. *Sydney*.
- (4) Convoy duty with Australian troops,
- (5) Protection of Australian trade routes,
- (6) Service on China Station based on Singapore, countering enemy plots,
- (7) Service in West Indies, patrolling off New York (light cruisers *Melbourne* and *Sydney*),
- (8) Service in Mediterranean combating submarine menace (destroyers *Yarra*, *Warrego*, *Parramatta*, *Torrens*, *Huon* and *Swan*),
- (9) Service at Dardanelles where submarine AE2 was lost,
- (10) Service in the North Sea with the Grand Fleet (H.M.A.S. *Australia*, *Melbourne* and *Sydney*).

### The Cost of Sea Power.

The capital expenditure involved in the construction and establishment of the Royal Australian Navy, including the estimate for the year 1918-19 amounts to £5,868,000.

The estimated cost of manning, maintaining and working the Australian Fleet during the whole period of the war, is £23,000,000 sterling, that is, of course, additional to the capital expenditure.

The foregoing facts and figures demonstrate in bold relief the soundness of the policy which promoted the establishment of an Australian Navy, and this realized the prediction of the writer in *The Times* on the eve of Australian Federation, that a new British power was about to appear in the Pacific Ocean.

51. (vii.) Lighthouses, lightships, beacons and buoys.

LEGISLATION.

LIGHTHOUSES (FISHER-HUGHES) ACT 1911.

The Commonwealth Government is empowered to make an agreement with any State or person for the acquisition by the Commonwealth of any light-house or marine mark, and to erect light-houses and marine marks within the jurisdiction of the Commonwealth.

It contains the necessary provisions for the protection of Commonwealth lights and marks, for removing misleading lights or marks, and for imposing light dues which are to supersede the light dues previously imposed by the States.

51. (viii.) Astronomical and meteorological observations :

LEGISLATION.

METEOROLOGY (DEAKIN-GROOM) ACT 1906.

The Governor-General is empowered to establish meteorological observatories, and to appoint a Commonwealth Meteorologist, who may, under the direction of the Minister, be charged with—the taking and recording of meteorological observations ; the forecasting of weather ; the issue of storm-warnings ; the display of weather and flood signals ; the display of frost and cold-wave signals ; the distribution of meteorological information ; and such other duties as are prescribed by regulation to give effect to the Act.

The Governor-General may enter into an arrangement with the Governor of any State in respect of the transfer to the Commonwealth of any observatory ; the taking and recording of meteorological observations by State officers ; the inter-change of meteorological information between the Commonwealth and State authorities ; and incidental matters.

The Governor-General may also enter into arrangements with the Governments of other countries for the interchange of meteorological information and incidental matters.

51. (IX.) Quarantine<sup>47</sup>;

## § 57. [ QUARANTINE.]

## LEGISLATION.

THE QUARANTINE (DEAKIN) ACT 1908.

THE QUARANTINE (FISHER) ACT 1912.

THE QUARANTINE (HUGHES) ACT 1915.

THE QUARANTINE (CONSOLIDATED) ACT 1908-15.

**Scope of Quarantine.**

The Consolidated Act opens with a definition of quarantine, which is declared to mean measures for the inspection, exclusion, detention, observation, segregation, isolation, protection, treatment, sanitary regulation and disinfection of vessels, persons, goods, things, animals, or plants, and having as their object the prevention of the introduction or spread of disease or pests affecting man, animals or plants.

A definition is then given of the following expressions, namely : —“ Disease ” in relation to animals means glanders, farcy pleuropneumonia contagiosa, foot and mouth disease, rinderpest, anthrax, Texas or tick fever, hog cholera, swine plague, mange, scab, surra, dourine, rabies, tuberculosis, actinomycosis, variola ovina, or any disease declared by the Governor-General by proclamation to be a disease affecting animals :

“ Disease ” in relation to plants means any disease or pest declared by the Governor-General by proclamation to be a disease affecting plants :

“ Quarantinable disease ” means small-pox, plague, cholera, yellow fever, typhus fever, or leprosy, or any disease declared by the Governor-General, by proclamation, to be a quarantinable disease.

**Administration.**

The Act then proceeds to make provision for an administration of quarantine laws and regulations. There is to be a Director of Quarantine who shall, under the Minister, be charged with the execution of this Act and the regulations thereunder.

There are also to be chief quarantine officers for such divisions of quarantine as the Governor-General thinks fit, who shall have such powers and functions as are conferred upon them by this Act or the regulations.

All quarantine officers (including chief quarantine officers) shall perform their powers and functions under and subject to the directions of the Director of Quarantine. The Governor-General is authorized to appoint all other quarantine officers necessary for carrying out the Act.

#### **Quarantine Powers.**

The Governor-General may enter into an arrangement with the Governor of any State in respect of all or any of the following matters :—The use of any State quarantine station or other place as a quarantine station under this Act, and the control and management of any such quarantine station ; also in matters necessary or convenient to be arranged in order to enable the Commonwealth quarantine authorities and the State health or other authorities to act in aid of each other in preventing the introduction or spread of diseases affecting man, animals, or plants.

The Governor-General may by proclamation declare any ports in Australia to be first ports of entry for oversea vessels ; declare any ports in Australia to be ports where imported animals and plants or any particular kinds of imported animals or plants may be landed ; appoint places on land or sea to be quarantine stations for the performance of quarantine by vessels, persons, goods, animals, or plants ; prohibit the introduction into Australia of any noxious insect or any pest, or any disease germ or microbe, or any disease agent, or any culture virus or substance or article containing any noxious insect, pest, disease germ microbe, or disease agent ; prohibit the importation into Australia of any articles likely, in his opinion, to introduce any infectious or contagious disease ; prohibit the importation into Australia of any animals or plants, or any parts of animals or plants ; (g) prohibit the removal of any animals, plants, or goods, or parts of animals or plants, from any part of the Commonwealth in which any quarantinable disease, or disease affecting animals or plants, exists, to any part of the Commonwealth in which the disease does not exist ; (h) declare any part of the Commonwealth in which any quarantinable disease or any disease or pest affecting animals or plants exists to be a quarantinable

area ; (i) or declare that any vessel, persons, animals, plants, or goods in any quarantine area, or in any part of the Commonwealth in which any quarantinable disease, or any disease or pest affecting plants or animals, exists, shall be subject to quarantine.

The power of prohibition under this section shall extend to authorize prohibition generally or with limitations as to place and subject-matter, and either absolutely or subject to any specified conditions or restrictions.

The powers conferred on the Governor-General by this section, in relation to the matters specified in paragraphs (g), (h) and (i) of sub-section 1, so far as they relate to animals or plants or any disease affecting animals or plants shall, as regards a part of the Commonwealth being a State or part of a State, only be exercised in cases where the Governor-General is satisfied that the exercise of those powers is necessary for the purpose of preventing the spread of a disease or pest affecting animals or plants, beyond the boundaries of that State.

The following vessels are declared to be subject to quarantine ; Every oversea vessel until pratique has been granted or until she has been released from quarantine ; every vessel (whether an Australian vessel or an overseas vessel) on board which any quarantinable disease or disease which there is reason to believe or suspect to be a quarantinable disease has broken out or been discovered (notwithstanding that pratique has been granted or that she has been released from quarantine) ; and every vessel which is ordered into quarantine by a quarantine officer.

The following persons shall be subject to quarantine :—Every person who is on board a vessel subject to quarantine, or who has been on board the vessel (being an oversea vessel) since her arrival in Australia ; every person infected with a quarantinable disease and every person who has been in contact with or exposed to infection from any person or goods subject to quarantine.

The following goods shall be subject to quarantine :—All goods which are on board a vessel subject to quarantine, or which have been on board the vessel (being an oversea vessel) since her arrival in Australia ; all goods infected with a quarantinable disease ; and all goods which have been in contact with or exposed to infection from any person or goods subject to quarantine.



All vessels, persons, and goods subject to quarantine shall continue to be so subject from the time when they became subject to quarantine until they are released from quarantine or until pratique has been granted.

A quarantine officer may, by order in writing, order into quarantine any vessel, person, or goods (whether subject to quarantine or not), being or likely to be, in his opinion, infected with a quarantinable disease or a source of infection with a quarantinable disease.

#### **Quarantine of Animals and Plants.**

No person shall land any imported animals or plants in any port or place in Australia except a port declared by proclamation to be a port where the imported animals or plants may be landed.

No imported animals or plants, and no hay, straw, fodder, litter, fittings, clothing, utensils, appliances, or packages used on any vessel in connection with imported animals or plants shall, until released from quarantine, be moved, dealt with, or interfered with except by authority and in accordance with this Act and the regulations.

No imported animals or plants, and no hay, straw, fodder, litter, fittings, clothing, utensils, appliances or packages used on any vessel in connection with imported animals or plants shall be landed or removed from the vessel until a permit for their landing or removal from the vessel has been granted by a quarantine officer.

#### **Expenses of Quarantine.**

The master, owner and agent, of any vessel ordered into quarantine, or of any vessel from which any person is removed to perform quarantine, shall severally be responsible for the removal of the passengers and crew to the quarantine station; the care and maintenance of the passengers and crew while detained at the quarantine station; and the conveyance of the passengers from the quarantine station to their ports of destination; and the medical surveillance of persons released under quarantine surveillance, and shall supply, to the satisfaction of the Minister, all such service attendance, meals, and other things as are required for those purposes, including domestic and laundry service, medicines, medical comforts, nursing, and attendance for the sick.

The master, owner or agent, of the vessel may arrange with the Minister for the carrying out of any responsibility under this section and for the payment of the expenses thereof, but in any case the Minister may take action if he thinks it necessary to do so, and any expense incurred shall be paid by the master, owner, or agent, of the vessel to the Commonwealth.

A passenger shall not be liable to compensate the master, owner, or agent for any cost incurred by the master, owner, or agent under this section, and any contract or stipulation purporting to impose any such liability upon him shall to that extent be null and void.

The master, owner, or agent, of any vessel ordered into quarantine, or ordered to be cleaned, fumigated, disinfected, or treated, shall pay all costs incurred in the cleaning, fumigation, disinfection, or treatment, of the vessel, or of any goods or things taken from the vessel.

Before permitting any persons, goods, personal effects, or things to leave or be removed from a vessel ordered into quarantine, the quarantine officer may require the master, owner, or agent, of the vessel to give security to the satisfaction of the quarantine officer that all responsibilities under this Part of the master, owner, and agent of the vessel, in respect of those persons, goods, personal effects, or things shall be faithfully carried out.

The owners and agents of any vessel subject to quarantine shall pay to the Commonwealth all expenses incurred by it in providing persons, who were removed from the vessel in order to perform quarantine, with passages to their ports of destination.

Any person detained in quarantine, who is not one of the crew or passengers of a vessel ordered into quarantine, shall, if he is reasonably able so to do, and is thereunto required by the Minister, pay to the Commonwealth the cost of any food and medicines supplied to him and those dependent on him during their removal to, or detention in quarantine.

#### **Quarantine generally.**

"The prevention of disease is the essence of quarantine law. Such law is directed not only to the actually diseased, but to what has become exposed to disease": *Smith v. St. Louis, &c. Railway*, (1901) 181 U.S., at pp. 255-256. To "quarantine" persons means

to keep them, when suspected of having contracted or been exposed to infectious disease, out of the community, or to confine them to a given place therein, and to prevent intercourse between them and the people generally of such community.

### Land Quarantine.

Numerous State Acts in America apply the term quarantine to measures for the prevention of the spread of diseases within the State. Thus the Statutes of Alabama enable any town to establish a quarantine ground, and enable the local authorities, not only to prescribe quarantine to vessels and to persons and things on board, but also to compel any person coming into the town by land to perform quarantine: Code of 1876, sections 1507-12; *Greensboro, v. Ehremeich*, (1886) 60 Amer. Rep., 130. The Charter of the Town of Kosciusko (Miss.) empowers the municipal authorities to make quarantine regulations for the health of the town: *Kosciusko v. Slomberg*, (1891) 24 Amer. St. Rep., 281. The Constitution of Georgia, Art. 7, paragraph 6, empowers county officials to levy a tax for the performance of "quarantine"; *Daniel v. Putnam County*, 113 Georgia, 570. Inter-state quarantine lines for cattle were authorized by Texas: Rev. Stat. 1895, Art. 5043 (c); see *Smith v. St. Louis, &c. Railway*, 181 U.S., 248. Quarantine on land boundaries is also provided for by the United States Acts of 29th April 1878, ch. 66, and 19th June 1906, ch. 3433. Note by Sir ROBERT GARRAN.

### Defects of Commonwealth Law.

The legislative power of the Commonwealth Parliament with respect to the subject matter of Quarantine is not, by the Constitution, limited in its definition as a matter of substance, nor is it restricted in its area of operation. The power is not broken by State boundaries. It covers all possible quarantine jurisdiction throughout the length and breadth of Australia from ocean to ocean. The Constitution treats the power as one and indivisible; vested in the Commonwealth as plenary in grant as such power could be exercised by the British Parliament.

Now for the definition of Quarantine. It means that legislative power, as understood in all English-speaking communities, upon the establishment of the Commonwealth in 1901. Parliament cannot enlarge the definition nor the grant as so understood. The interpretation placed by the Commonwealth Parliament on the term

quarantine as given in the Act of 1908, amended by the Act of 1912-1915, is:—"measures for the inspection, exclusion, detention, observation, segregation, isolation, protection, treatment, sanitary regulation, and disinfection of vessels, persons, goods, things, animals or plants, and having as their object the prevention of the introduction or spread of diseases or pests affecting man, animals or plants"

In exercising its legislative power in the Acts of 1908, of 1912, and of 1915, Parliament has taken less than the whole power contained in the Constitution and even less than its own definition of its power in its own Act. It has taken over only part of the power and left the balance to the States. The subject of quarantine has not been federalized as it ought to have been done. Parliament does not occupy the whole possible field of quarantine legislation. Parliament, possibly yielding to the tender susceptibilities of the States did not desire to interfere with the health laws and regulations of the States. On a subject of such vital and national importance it has only legislated in a half-hearted manner without adequate regard as to the requirements of the situation. For the recent failure and break-down of federal quarantine laws (January and February, 1919) experienced in the first great trial of strength and efficiency, the Constitution itself is not to blame. If anyone is to blame, it is the Federal Parliament and its advisers, and in a secondary degree the State Governments and their advisers for their limited vision and short-sighted policy in not completely federalizing the power.

The quarantine laws of the Commonwealth, as contained in the above recited Acts, limits the Federal authority—

1. To vessels, persons and goods imported into Australia from beyond the seas and to limited proclaimed areas within Australia.
2. To animals and plants within Australia declared by proclamation to be the subject of quarantine.

Under this limited legislation the Commonwealth Government has no effective authority to proclaim a State a quarantine area and to exercise sovereign power therein. For the limited purpose of quarantine control over animals and plants the power may be considered to be federalized and the Commonwealth can occupy the whole field of jurisdiction to the exclusion of the States, but with respect to persons and other goods, not being animals and plants,

the Commonwealth sovereign and exclusive authority is restricted to such persons and goods coming from across the seas. This limited assumption of power by the Federal Parliament, leaves the whole residue of potential authority including the police, health and sanitary jurisdiction of the States in the hands of the States.

With respect to inter-state traffic, the mandatory provisions of section 92 of the Constitution intervene. It reads as follows:—  
“On the imposition of uniform duties of customs, trade, commerce and intercourse among the States whether by means of internal carriage or ocean navigation shall be absolutely free.”

The High Court has decided on the case of *The King v. Smithers ; Ex parte Benson*, 16 C.L.R., 99, that the scheme of Federal union, as well as the express terms of section 92 largely curtails the original police powers of the States with respect to preventing passenger traffic into and through the States. The police powers of the States, including their quarantine authority have been largely cut down by the absolute mandate of section 92, that “intercourse shall be absolutely free.” This section would, no doubt, be construed to prohibit the States from interfering with the free traffic of healthy passengers across the borders. It would also reasonably prevent the States from prohibiting the transit of goods across the borders even for alleged quarantine purposes. The mandate of the Constitution would be stronger and more effective than any reserved powers of the States, but there would be a natural limit to the operation of the Constitutional mandate. The States might allow goods and passengers to cross their borders but immediately upon their entering the State domains and mingling among the mass of State population and State property they would, in the existing state of quarantine law, become liable to State laws.

All these debatable questions might have been avoided if the Federal Parliament had exercised its undoubted authority under the Constitution and dealt generally, and exhaustively, with the question of quarantine restrictions and control and taken to itself all the necessary powers.

Federal laws with reference to quarantine would be on the same plane as section 92 of the Constitution. If there were any conflict between the mandate of section 92 and Commonwealth quarantine legislation, there could be no doubt that the safety of the State and the preservation of the health of the community would

be allowed to prevail over all other considerations. Whilst, therefore, State laws with reference to quarantine would be subordinate to the constitutional mandate, Federal laws would in the end prevail. This would secure certainty as well as uniformity of law in dealing with quarantine.

### **Inter-state Agreement.**

At a conference of Commonwealth and State Premiers held on 27th November 1918, at which the quarantine and health officers of the Commonwealth and the States were present, an agreement was arrived at as to what was to be done in case of a sudden outbreak of an infectious disease.

All the Governments concerned gave their assent to a scheme of action and co-operation of which the following were the principal terms :—

4. That upon the proclamation of any State as infected, all traffic with that State be suspended until a case breaks out in a neighbouring State, when traffic may be resumed between the infected States—

Provided that inter-state sea traffic be permitted, subject to strict quarantine, no person being allowed to travel from the infected State except on a permit issued by the Commonwealth Government.

Provided further that these restrictions shall not apply to inter-state local traffic amongst residents within ten miles of the border of any State in any area which is clean, or to such further areas as may be exempted with the concurrence of the continuous States and of the Commonwealth Government.

5. That upon the proclamation of any State, as infected, the Commonwealth should take complete control of all inter-state traffic, both by land and sea, and that the States should render to the Commonwealth every possible aid and co-operate in the effective carrying out of the regulations.

On 30th January 1919, it became manifest that pneumonic-influenza had been introduced into both Victoria and New South Wales and that it was suspected that infected persons were travellers from one State into another State. The Government of New South Wales decided to take the drastic step of stopping passenger traffic altogether between Victoria and New South Wales. Both States having been admittedly infected with influenza, the obvious policy would have been that prescribed by the inter-state agreement; both States should have been regarded as one quarantine area within which, of course, land traffic should have been allowed to proceed as usual.

On 5th February matters came to a crisis, the Acting Prime Minister, Mr. WATT, made a full statement regarding the Commonwealth's position in the epidemic. He said that he had received replies from the States to his telegram regarding the breach of the agreement entered into on 27th November. Tasmania asked the Commonwealth to continue to operate the quarantine in all its terms. New South Wales intimated that while they were desirous of co-operating in every possible way with the Commonwealth Government, it did not propose to depart from the attitude which it had adopted in regard to the matter. Then Western Australia and Queensland indicated that they did not wish to vary the procedure which they had adopted. As Victoria and South Australia had not broken the agreement, he did not receive replies from them. In view of the happenings it was almost impossible for the Commonwealth to continue to co-operate with all the States. The Commonwealth Government, said Mr. WATT, had decided to renounce the agreement, and the Commonwealth quarantine laws would operate from 6th February. The existing restrictions against infection for all oversea ports would be enforced. The Commonwealth would control all the sea traffic between the infected States and no person would be allowed to travel by sea between the States unless he had a permit from the quarantine authorities. Vague references were made to the intention of the Commonwealth "to fall back on its constitutional powers." But, unfortunately, the Federal Parliament had refused to accept all the power which the Constitution permitted it to take. Then came the announcement and the admission that the Federal Government was powerless to act except at the sea-board. Yet neither this agreement nor the fact that, when quarantine measures were in force, the Commonwealth authorities have legally the exclusive control of inter-state traffic weighed with the New South Wales Ministry. Although it had been announced when the States were quarantined that the Commonwealth had taken control of the traffic, New South Wales decided to raise a constitutional issue by acting independently. What is still more remarkable is the fact that no news whatever as to the situation in New South Wales or the action proposed to be taken there in regard to intercourse with Victoria or the other States reached the Commonwealth authorities from New South Wales. The Commonwealth Government received an intimation from the Western Australian authorities that it was proposed to apply quarantine measures to the express train which left Port Augusta for Kalgoorlie on Wednes-

day, and to hold the train up at Parkeston before it reached Kalgoorlie. As South Australia was a "clean" State, presumably the action was decided upon in case infected passengers from Melbourne or other eastward States should be on the express. But obviously, since the train and the line itself is Commonwealth property, the proposal involved some critical constitutional points. The Commonwealth Government was in communication with the Western Australian authorities regarding the position. Thus, the Commonwealth quarantine service, which should legally have had co-ordinated control of the traffic and quarantine arrangements, and should have been in a position to know all the details of the situation in the various States, and to issue proper instructions relating to the treatment of trains, ships and passengers, found itself practically powerless. Complaints poured in from aggrieved intending travellers, some of whom were very unfortunately placed, and chaos reigned: *The Age*, 31st January 1919.

Dr. Cumpston said that the Commonwealth authorities had ample powers to intervene within the States to control the outbreak. The law officers of the Commonwealth Government, however, were not satisfied that the powers of the Commonwealth to intervene so as to control quarantine away from the sea-board, were sufficient for the Commonwealth Government to act. They were of opinion, it is said, that while the nominal powers of the Commonwealth were sufficient, the actual ones were not. It might be possible to make decrees that would supersede the authority of the States, but there was no legal machinery to enforce them. In a way the situation was much the same as the one in which Mr. Justice HIGGINS found himself in the Arbitration Court. He could make awards, but had to depend upon the State organization to enforce them. Without a police force, with no control over transit, or of hospitals, the Commonwealth Government might "Call spirits from the vasty deep" with no chance of their coming: *Bendigo Advertiser*, 6th February 1919.

Such was the description of the result of divided control in matters relating to internal or inland quarantine, as given in the daily press and it was substantially correct. With respect to control at the sea board the province and power of the Commonwealth authorities were clearly established.

As the law stands at present, it is obvious that the Federal authority is absolutely paralyzed in the presence of the concurrent



laws of the States. It is true that section 11 (b) of the Consolidated Quarantine Act of 1908-1915 provides that the Governor General may enter into an arrangement with the Governor of any State in respect to any means necessary or convenient to be arranged in order to enable the Commonwealth authorities and the State health or other authorities to act in aid of each other in preventing the introduction or spread of diseases affecting man, animals, or plants. It is doubtful whether the agreement of November 1918 comes within the meaning of that sub-section and even if it does there appears to be no means of enforcing such an agreement. Certainly there is nothing to prevent any State repudiating such an agreement, as soon as it suits its convenience. It is very doubtful whether any agreement of the kind would have legislative force binding the people of adjoining States. Quarantine matters involving the liberty of the subject, the health of the people, and the rights of property should not be settled by voluntary agreement between the States but should be settled by positive Statute law, which no State can repudiate.

#### **Landing of Troops in Quarantine.**

The extent of Commonwealth control over quarantine at the sea-board was definitely raised and decided in the case of the *State of Queensland v. The Commonwealth*, which came before Mr. Justice GAVAN DUFFY in the High Court in Chambers, Melbourne, on 10th February 1919. The Government of the State of Queensland applied for an interim injunction to restrain the Commonwealth Government or its officers from landing troops from quarantined transports within that portion of Queensland south of the Tropic of Capricorn, there to place them in quarantine areas. Plaintiffs claimed that on 6th February the Governor of the State of Queensland, in pursuance of provisions of the Health Acts of 1900 to 1917 of the said State, declared pneumonic influenza to be an infectious disease. The Commissioner of Public Health then decided that an emergency had arisen, and a regulation was framed, reading:—

The master of any vessel arriving within Queensland waters, within any locality the limits of which have been, or may be, defined as the limits of a locality which is likely to be subjected to a visitation of pneumonic influenza from a port outside Queensland, shall, if so directed by the Commissioner, bring his vessel to anchor and lie at anchor in Moreton Bay at Moreton Island, or in such other place as may be prescribed by the Commissioner, in such position and at such distance from the shore as may be prescribed by the Commissioner, and for such period as in the opinion of the Commissioner may be considered necessary in the interests of public health to prevent the entrance

into Queensland of the disease known as pneumonic influenza or effective in ensuring the suppression of such disease. All or any persons on board any such vessel, including the master of such vessel, shall be subject to the orders and directions of the Commissioner in relation to their examination, isolation and accommodation.

On behalf of the plaintiffs it was stated that the defence authorities threatened, and intended, unless restrained, to act in contravention of the foregoing Queensland State regulation, and to disregard it by refusing to obey it, and the plaintiffs sought a declaration that the proclamation and regulation were valid, of full force and effect, and binding on the persons in control of all vessels, and asked for an injunction restraining the Commonwealth, its officers, agents and servants, from disobeying them. It was further stated that one party of 200 returned soldiers from the transport *Karoola* had, in contravention of the regulation, been landed at the quarantine station at Lytton, Brisbane, and that four of their number broke camp, and had to be searched for and arrested. It was learned that another 2,000 returned soldiers were to be landed on 10th February, and it was feared that they would be the means of introducing the epidemic to Queensland. It was the unanimous opinion of Queensland health officers that soldiers should not be landed on the mainland, but should be quarantined on one of the islands in Moreton Bay, from which escape would be almost impossible. It was argued by counsel that although section 51 (ix.) of the Constitution Act transferred quarantine to the Commonwealth, a State has a right to keep persons out of the State who are liable to spread disease throughout the State; that a State had full authority to prevent any person from entering the State who might introduce disease.

Mr. Justice DUFFY said:—"But you do not propose to keep them out of the State. What you propose to do is to say where, within your State certain persons shall be landed and where certain transports shall anchor. The men concerned are soldiers who left the State under orders to fight for the Commonwealth. They are in the hands of the Defence Department, which can surely order the soldiers to proceed to any portion of the Commonwealth. If it is a matter of repatriation, surely the Commonwealth can return men from whence it took them. If the States can prevent men landing where is the power of the Commonwealth Government to admit them? He might as well say that he had not been convinced that the Queensland Government had ground for an action in law. Yet

it might be considered by plaintiffs that the matter should be argued before the Full Court, and he did not wish to do anything that would prevent that being done. He could refuse the application ; could refer it to the Full Court, or could adjourn it so that the matter could be left open.

Counsel for the Commonwealth opposed any adjournment and did not think that any application should be made to the Full Court unless His Honor thought there was any point to be argued. His Honor said :—" I do not." The plaintiffs, he said, had not established any ground in law for the application or in support of the application. In ordinary circumstances the application would have been refused, but the points plaintiff had put before him had been gravely argued, and he gave the representatives of Queensland credit for thinking that the acts of the Queensland Government were correct. That being so, he thought the best thing to be done was to adjourn the application. If plaintiff's points were valid they were of vast importance to the State of Queensland, and could only be finally decided by a sitting of the Full High Court. In order to preserve to plaintiff the right to carry the question further, he proposed, as he said, to adjourn the application to a day to be appointed, and either party might apply to him to have the time of hearing fixed. If no irreparable consequences arose through landing troops at the quarantine station, he presumed the matter would rest where it was, but in any event it should be understood that nothing done by him should be taken as expressing any doubt as to the validity of the Acts of the Commonwealth in dealing with these or other soldiers in Australia, or coming back to Australia. The same applied to all ships and all people coming to the Commonwealth. His Honor ordered that plaintiffs should pay defendant's costs up to date. —*The Argus*, 11th Feb., 1919.

51. (x.) Fisheries<sup>58</sup> in Australian waters beyond territorial limits :

§ 58. "FISHERIES IN AUSTRALIAN WATERS."

Weighty reasons were advanced in the Convention, both for and against the retention of the words " Australian waters beyond territorial limits." In opposition to the words reference was made to the vagueness of the expression " Australian waters."

In the absence of a definition, it was said, complicated questions might arise in practice as to how far from the Australian coast "Australian waters" might be deemed to extend, and whether at a given time a fishing boat was within those waters. More important still was the innovating proposal to give the Federal Parliament power to legislate respecting fisheries beyond its territorial limits. Outside those limits the ocean was the highway of all nations, and no country could claim to exercise exclusive jurisdiction over the high seas. It was not conceivable that any law affecting fisheries outside the territorial limit would be legally operative. It was not sufficient to say that the Imperial Parliament would give the Commonwealth power to legislate in respect of matters occurring beyond those limits. The Imperial Parliament could not effectively grant the Commonwealth a power which, according to the law of nations, it did not possess.

The arguments in support of retaining the words admitted the difficulties pointed out, but claimed that there were powerful considerations which more than outweighed those difficulties. In the first place this was by no means a new and untried grant of power; by section 15 (c) of the Federal Council of Australasia Act (48 & 49 Vict. c. 60), power was given to that body to legislate in respect of "fisheries beyond territorial limits," the identical words used in this sub-section; the only condition to the exercise of its jurisdiction being (1) that its laws should be enforced only in Colonies which had adopted the Act and which were represented in the Council, and (2) that proposed laws relating to section 15 (c) should be reserved for the signification of Her Majesty's pleasure. This had not remained a dormant power, but had been exercised.

In January, 1888, the Federal Council passed an Act to regulate pearl-shell and beche-de-mer fisheries in Australian waters, adjacent to the Colony of Queensland.

This Act was reserved for the Royal assent, which was proclaimed on 19th July, 1888. In February, 1889, the Federal Council passed an Act to regulate the pearl-shell and beche-de-mer fisheries in Australian waters adjacent to the Colony of Western Australia. It contained provisions substantially similar to those of the Queensland Act. The extra-territorial waters, within which it was declared to be in force, were defined in the schedule.

Both the Queensland and West Australian Acts are remarkable for the stringency of their provisions relating to the employment of coloured labour, showing that " laws with respect to fisheries " are capable of comprehending regulations controlling the employment of labour used in connection with fisheries. These Acts are still in force, their operation being preserved by clause 7 of the Commonwealth Constitution Act. Thus, it was pointed out, extra-territorial laws relating to fisheries had been already sanctioned by the Imperial Government, and enforced by the Governments of the two Colonies over a wide expanse of ocean, the boundaries of which were defined within parallels of latitude and degrees of longitude. The pearl-shell and beche-de-mer trade had been regulated ; the fisheries had been protected ; fees had been collected ; labour had been supervised, and everything expected and desired had been obtained. Here, therefore, they had an illustration of the practicability of the grant of power contemplated. Having received such a grant in the Federal Council Act, it would not be wise for Australia to surrender it by omitting a similar enabling provision from the Constitution of the Commonwealth. The power should appear on the face of the Constitution ; they ought not to trust any implication hidden away in other clauses.

The practical arguments were strengthened by broader and more patriotic consideration. Such spheres of influence and control as had been already granted by the Imperial Parliament to the Federal Council should be reserved for and transferred to the Commonwealth.

The people of such a Continent as Australia, unique in its isolation and configuration, should have the right of control over waters outside the ordinary territorial limits. We should begin our career as a Commonwealth by mapping out a sphere of influence, and of commercial trading operations, all round the Continent, and for some considerable distance from the coast. Within that sphere the Commonwealth would represent and protect, not merely Australian interests, but Imperial interests. We were taking over general powers from the States and from the Federal Council, and those powers should be accepted undiminished, and maintained unimpaired, without abandoning one jot or yielding one tittle of what had been acquired by the labours and triumphs of the pioneers of Australian progress. (See speeches of Mr. C. C. KINGSTON, Sir JOHN FORREST, Mr. A. DEAKIN, and Mr. R. E. O'CONNOR. Conv. Deb., Melb., pp. 1861-1863 and 1872).

**Extra-Territorial Operations of Law.**

This sub-section affords an interesting illustration of one of the few Federal powers granted to the Commonwealth Parliament authorizing it to pass laws capable of having extra-territorial operations, that is, operating on the high seas beyond the three mile limit. Generally speaking, the grant of powers of self-government to the component parts of the British Empire connotes restriction of their exercise to the limits of the local territory and its adjacent sea limit is recognized universally by the law of nations and by Statute : Territorial Waters Jurisdiction Act 1878, 41 & 42 Vict. c. 73.

Hence in the grant of powers to the self-governing communities of the Empire the maxim *Extra territorium jus dicenti impune haud paretur* primarily applies (*Macleod v. Attorney-General for New South Wales*, (1891) A.C., 455, at p. 458), as it does to other acts of British legislation, and to extend the effect something must appear either from the express language or the necessary scope and intent of its operations as apparent on the face of the Statute. Whatever is necessarily incident to the proper exercise of a power passes with it as an implication : *Kielley v. Carson*, 4 Moo. P.C.C., 63; *Barton v. Taylor*, 11 App. Cas., 197; *Baxter v. Commissioners of Taxation (N.S.W.)*, 4 C.L.R., 1087, at pp. 1157, 1158; *Attorney-General for Canada v. Cain*, (1906) A.C., 542; *Hudson v. Guestier*, 6 Cranch, 281; *The Ship "North" v. The King*, 37 Can. S.C.R., 385. These cases are examples of accessory incidents attached by necessary implication to main powers even where the accessory powers require extra-territorial application; but they are clearly to be distinguished from any authority to claim additional main powers. Per ISAACS, J. in the *Merchant Service Guild of Australasia v. The Commonwealth S.S. Owners' Association*, (1913) 16 C.L.R., at p. 690.

**51. (XI.) Census<sup>58A</sup> and statistics :****§ 58A "CENSUS AND STATISTICS."****LEGISLATION.****CENSUS AND STATISTICS (DEAKIN) ACT 1905.**

The office and bureau of Commonwealth Statistician is created, with powers and duties defined partly by the Act and partly by regulations under which arrangements may be made with the States for aid in giving effect to the Act.

A census is directed to be taken in the year 1911 and in every tenth year thereafter, on a day to be appointed by proclamation. The Statistician is required to collect annually statistics in relation to the following matters :—population ; vital, social, and industrial matters ; employment and non-employment ; imports and exports ; inter-state trade ; postal and telegraphic matters ; factories, mines and productive industries generally ; agricultural, horticultural, viticultural, dairying, and pastoral industries ; banking, insurance and finance ; railways, tramways, shipping, and transport ; land tenure and occupancy ; and any other prescribed matters.

#### WAR CENSUS (HUGHES) ACT 1915.

On 23rd June 1915, when it became evident that there would be long continuance of war and that an appeal would have to be made to the manhood and financial resources of the Commonwealth in order to prosecute the war, an Act was passed providing that a census or censuses should be taken in such States, territories, or parts of the Commonwealth and on such day or days, or within such period or periods as the Governor-General might appoint by proclamation. The persons or class of persons who were required to furnish particulars for the purpose of any such census and the nature of the particulars required to be furnished, were directed to be specified in such proclamation. Thereupon it became the duty of the Commonwealth Statistician to prepare forms and instructions and to take all necessary steps for the taking and collection of the census.

• 51. (XII.) Currency,<sup>59</sup> coinage,<sup>60</sup> and legal tender<sup>61</sup> :

#### § 59. " CURRENCY."

##### LEGISLATION.

#### AUSTRALIAN NOTES (FISHER) ACT 1910-1911.

##### Conditions of Issue.

The Treasurer, is empowered with the authority of the Governor-General-in-Council, to issue Australian Notes, and to re-issue and cancel them. Australian notes may be issued in any of the following denominations, namely, ten shillings, one pound, five pounds ten pounds or any multiple of ten pounds. They are a legal tender throughout the Commonwealth and all territories under its control. and are payable in gold coin on demand at the Commonwealth Treasury at the Seat of Government.

The moneys derived from the issue of Australian notes and any interest thereon are to be placed to the credit of an account called the Australian Notes Account, which is a trust account within the meaning of the Audit Act. Part of the moneys standing to the credit of the Australian Notes Account is to be held by the Treasurer in gold coin for the purposes of the reserve provided for in the Act, and the Treasurer may invest the remainder.

By the Act of 1910, the Treasurer was required to hold in gold coin a reserve as follows :—(a) an amount not less than one-fourth of the amount of Australian notes issued up to seven million pounds and (b) an amount equal to the amount of Australian notes issued in excess of £7,000,000.

By the amending Act of 1911, the required amount of the reserve was altered to be “ not less than one-fourth of the amount of Australian notes issued.”

#### **Volume of Note Issue.**

On the 24th January 1919, the number of Commonwealth notes issued and in circulation and not redeemed were 19,024,083, representing an amount of £57 725 009 sterling. The amount of gold coin held in the Treasury for the purposes of the Act at that date was £22,025,971 10s., representing 38.15 per cent. of the notes in circulation. In addition, gold was held elsewhere amounting to £500,000. Including this sum, the gold reserve was 39.02 per cent. of the notes in circulation.

### **§ 60. “ COINAGE.”**

#### **LEGISLATION.**

##### **COINAGE (FORREST) ACT 1909.**

#### **Denominations of Coins.**

In the terms of the Imperial Coinage Act 1870, this Act fixes the standard weight and fineness of gold, silver, and bronze coins. It authorizes the Treasurer to cause to be made and issued silver and bronze coins of the following denominations: Silver—florin, shilling, sixpence, threepence; bronze—penny, half-penny. It also authorizes the issue of nickel coins of the denominations, weight, and fineness to be specified in any proclamation under the Act. It provides that British or Australian coins shall be a legal tender—(a) in case of gold coins, to any amount; (b) in case of silver coins,



up to forty shillings; and (c) in the case of bronze coins, up to one shilling. It also enables the Governor-General, by proclamation, to declare that any coins other than silver or bronze shall be current and legal tender to any amount, not exceeding five shillings, specified in the proclamation. And it requires all instruments and transactions relating to money to be in terms of coins which are current and a legal tender under the Act, unless it is in terms of the currency of some British possession or foreign country.

#### **Decimal System.**

In 1902 a Select Committee of the House of Representatives, of which Mr. G. B. EDWARDS was Chairman, reported in favour of a decimal system of coinage, on a gold basis, with the British sovereign as standard: V. & P., 1901-1902, vol. 1, p. 861. The report was adopted by the House on 19th June 1903; and a further resolution of the House in favour of legislation for carrying out the recommendations of the Committee was passed on 16th June 1904.

#### **§ 61. "LEGAL TENDER."**

Commonwealth notes and certain coins are made legal tender throughout the Commonwealth. See "Currency" and "Coinage."

51. (XIII.) Banking<sup>62</sup> other than State banking; also State banking extending beyond the limits of the State concerned, the incorporation<sup>63</sup> of banks, and the issue of paper money;

#### **§ 62. "BANKING."**

##### **LEGISLATION.**

#### **COMMONWEALTH BANK (FISHER) ACT 1911-1914.**

##### **Constitution and Business.**

This Act established a Commonwealth Bank, called the Commonwealth Bank of Australia, with power to carry on the general business of banking, to acquire and hold land, to receive money on fixed deposit or current account, to make advances, to discount bills and drafts, to issue bills and drafts and grant letters of credit, to deal in exchanges, specie, etc., to borrow money, and to do anything incidental to the above. But it is expressly forbidden to issue bank notes for circulation as currency. (Australian notes are issued by the Treasury; see Notes to section 51 (XII.), *supra*).

The capital of the Bank was £1,000,000, to be raised by debentures. This capital was, in 1914, increased to £10,000,000. The Treasurer is empowered to advance money to the Bank, at 3½ per cent., for preliminary expenses and initial capital. One-half of the net profits of the Bank is to be credited to a bank reserve fund, available for the payment of any liabilities of the Bank. The other half is to be credited to a Redemption Fund, which may be used in repayment of any money advanced to the Bank by the Treasurer, or in the redemption of the debentures or stock issued by the Bank; and any excess may be used on the redemption of any Commonwealth debts, or State debts taken over by the Commonwealth. The Commonwealth is declared to be responsible for the payment of all moneys due by the Bank.

The management of the Bank is vested in a Governor, appointed by the Governor-General and holding office, during good behaviour, for a term of seven years. The Governor may establish branches or agencies of the Bank in any part of the Commonwealth or of any territory under the control of the Commonwealth, and with the consent of the Treasurer may establish branches in London and in any part of the world. The Governor may also establish a Savings Bank department, and branches or agencies thereof.

#### Six Years' Record.

In the first business period of the Commonwealth Bank, the broken year to June 30, 1913, the general and savings branches both registered losses amounting to £46,636, but though the savings branch continued to show a debit balance for two years longer, the profits from the general business of the Bank more than counter-balanced the deficit, and the Bank, as a whole, consequently has shown a profit since 1913.

The profits made by the Bank in 1917-18 were nearly £150,000 below the figures for the preceding year which was the best in the history of the Bank.

The complete record of the Bank to June, 1918, is as follows :—

Period.	General Bank.			Savings Bank.		
	£	s.	d.	£	s.	d.
To June 1913 .. ..	*24,328	13	1	*22,307	19	6
1913-14 .. ..	†36,089	11	5	*26,448	13	8
1914-15 .. ..	†45,144	14	9	*5,927	8	5
1915-16 .. ..	†124,539	11	8	†20,307	16	4
1916-17 .. ..	†341,021	7	4	†38,201	14	0
1917-18 .. ..	†195,881	15	4	†36,777	6	2
	* Debtor.			† Creditor.		

The total net profits of the bank from its inception to the end of the last financial year were £758,951/2/4 to which the general bank contributed £718,348/7/5, and the savings bank £40,602/14/11. Half the profits go to the reserve fund, and the other half to the redemption fund.

The London branch of the Bank, on June 30, 1916, had 493 private accounts with a total credit of £26,729. By the end of 1917 the number of accounts had increased to 1,075 and the credit balance to £455,563.

### § 63. "THE INCORPORATION OF BANKS."

Though, according to the dicta of High Court Judges expressed in *Huddart Parker v. Moorehead*, 8 C.L.R., 330, the Commonwealth has no general power to create corporations, that power is expressly given to it as regards banking corporations; *Jumbunna Mine v. Victorian Coal Miners' Association*, 6 C.L.R., at pp. 334, 355; *Huddart Parker v. Moorehead*, 8 C.L.R., at p. 363.

51. (XIV.) Insurance,<sup>64</sup> other than State insurance; also State insurance extending beyond the limits of the State concerned:

### § 64. "INSURANCE."

#### LEGISLATION.

##### LIFE ASSURANCE COMPANIES (GROOM) ACT 1905.

The main object of this Act is to limit the amount of money payable by life assurance companies on the death of children, and it contains provisions to prevent the prescribed amount being exceeded in any case by multiple insurances of a child. A life assurance company may not pay any sum, on the death of a child under ten years of age, except to the parent or the personal representative of the parent, nor except upon the production of a certificate of death specially issued for the purpose by a Registrar of Deaths and indorsed to the Company.

The Act does not apply when the person insuring has an interest in the life of the child; nor where the insurance is effected by a person

*in loco parentis* as an advancement of the child, and the amount payable on death under 21 years does not exceed the premium payments with interest at 4 per cent.

#### MARINE INSURANCE ACT 1909.

This Act (which, in compliance with the limited scope of the constitutional legislative power, is expressed not to apply to State marine insurance except when it extends beyond the limits of the State concerned) exactly follows the code framed by Mr. Chalmers, as enacted in Great Britain by the Marine Insurance Act 1906.

It applies to marine assurance and to State marine assurance extending beyond the limits of the State concerned. A contract of marine insurance is a contract whereby the insurer undertakes to indemnify the assured, in manner and to the extent thereby agreed, against marine losses, that is to say, the losses incident to marine adventure. A contract of marine insurance may, by its express terms, or by usage of trade, be extended so as to protect the assured against losses on inland waters or on any land risk which may be incidental to any sea voyage. Subject to the provisions of this Act, every lawful marine adventure may be the subject of a contract of marine insurance. Every contract of marine insurance by way of gaming or wagering is void. Subject to the provisions of this Act, every person has an insurable interest who is interested in a marine adventure. The assured must be interested in the subject matter insured at the time of the loss, though he need not be interested when the insurance is effected.

The mode of ascertaining an assurable value is prescribed as follows :—A contract of marine insurance is a contract based upon the utmost good faith, and, if the utmost good faith be not observed by either party, the contract may be avoided by the other party. Subject to the provisions of any Act, a contract of marine insurance is inadmissible in evidence in an action for the recovery of a loss under the contract unless it is embodied in a marine policy in accordance with this Act.

Other provisions of the Act relate to double insurance, warrants, the voyage, the assignment of policy, the premium, loss and abandonment, measure of indemnity, return of premium, and mutual insurance. A statutory form of policy is given in the second schedule of the Act.

51. (xv.) Weights<sup>65</sup> and measures :

## § 65. "WEIGHTS AND MEASURES."

This sub-section has been twice mentioned in judgments of the High Court as an example of a power which manifestly includes a power to regulate the domestic affairs of the States, and to control to some extent the operations of State Governments : *Attorney-General of New South Wales v. Collector*, 5 C.L.R., at p. 833 ; *R. v. Barger*, 6 C.L.R., at p. 69.

In *Attorney-General for New South Wales v. Brewery Employees' Union*, 6 C.L.R., at p. 614, Mr. Justice HIGGINS observed that power "to make laws with respect to weights and measures" is wider than the power of the United States Congress to "fix the standards of weights and measures."

**Decimal System.**

A select committee of the House of Representatives, which in 1902 reported in favour of a decimal system of coinage (see Notes on section 51 (xii.)), incidentally recommended the co-operation of the Commonwealth in any movement for the decimalization of the weights and measures of the Empire. The report was adopted by the House on 19th June 1903, and both Houses passed resolutions in favour of a metric system of weights and measures for the Empire.

51. (xvi.) Bills of exchange<sup>66</sup> and promissory notes :

## § 66. "BILLS OF EXCHANGE."

## LEGISLATION.

## BILLS OF EXCHANGE ACT 1909-1912.

This comprehensive measure consolidates the law relating to bills of exchange, cheques and promissory notes, and is in operation throughout the Commonwealth. The Consolidation is based on the model of the English Act. The amending Act of 1912 merely corrects a typographical error, in the principal Act.

## 51. (xvii.) Bankruptcy and insolvency :

No Commonwealth legislation has been passed with reference to this subject matter, but it is understood that a Bill has been drafted and that it will be dealt with when the state of public business affords an opportunity.

**51. (xviii.) Copyrights,<sup>67</sup> patents<sup>68</sup> of inventions and designs,<sup>69</sup> and trade<sup>70</sup> marks :**

**§ 67. " COPYRIGHT."**

**LEGISLATION.**

**COPYRIGHT ACT 1905.**

The first Copyright Act passed by the Federal Parliament established a copyright office and provided for a Registrar of Copyrights. It dealt with literary, musical, and dramatic copyright, and also with artistic copyright. The term of copyright was forty-two years, or the author's life and seven years, whichever was the longer. Registration was a condition precedent to the bringing of proceedings for infringement. First publication or production in Australia was essential to protection. As copyright was only conferred on books printed from type set up or plates made in Australia ; and as regards artistic works, copyright was only on those made in Australia.

**COPYRIGHT ACT 1912.**

The British Copyright Act 1911, passed as a result of and after conference with the self-governing Dominions, placed the whole law of Empire copyright on a new footing. It is expressed to extend throughout His Majesty's dominions ; with the proviso that it shall not be operative in a self-governing Dominion unless declared by the Legislature of that Dominion to be in force therein, either with or without modification or addition, relating exclusively to procedure and remedies, or necessary to adapt the Act to the circumstances of the Dominion. The Act is also " deemed to extend " to any Dominion with respect to which the Secretary of State certifies, by notice in the *London Gazette*, that the Dominion has passed legislation under which the works of British authors resident out of the Dominion, and of foreign authors resident in the British Dominions to which the Act extends, enjoy within the Dominion rights substantially identical with those conferred by the British Act. Each Dominion, in order to enjoy the full benefit of the British Act, has the option of either declaring it to be in force in the Dominion, or of passing substantially identical legislation. The Commonwealth of Australia has chosen the former course. The Commonwealth Copyright Act 1912 repeals the Act of 1905 and

declares that the British Act, with a few small adopting modifications is in force in the Commonwealth as from the 1st July 1912.

The British Act which is annexed as a schedule to the Australian Act repeals all the old copyright laws, and provides for a comprehensive system of Imperial and International copyright. It extends to literary works (including maps, charts, plans, tables, and compilations), dramatic works (including choreographic works or entertainments in dumb show, and cinematograph productions musical works, and artistic works (including architectural works of art). Copyright subsists in every original work just published within the parts of the British Dominions to which the Act extends, and to unpublished works whose author was, when he made the work, a British subject or resident within those parts. Copyright is defined as the sole right to produce or reproduce a work, or any substantial part thereof, in any material form whatever; and to perform it (performance meaning any acoustic representation and any visual representation of dramatic action), or in the case of a lecture to deliver it; and in the case of an unpublished work to publish it; and includes rights of translation, dramatization or conversion, the right to make any record, perforated roll, cinematograph film, or other contrivance for mechanical performance, and the right to authorize any such acts. The term of copyright is the life of the author and fifty years after his death.

The part of the Act dealing with international copyright empowers His Majesty, by Order in Council, relating to a foreign country, to apply the Act (a) to works first published in the foreign country as if they were first published in a British Dominion to which the Act extends; (b) to works of the subjects or citizens of the foreign country, as if they were British subjects; (c) to residence in the foreign country, as if it were residence in a British Dominion to which the Act extends. Such an Order in Council may only be made with respect to a foreign country which has entered into a Copyright Convention with Great Britain, or satisfies His Majesty that it grants reciprocal rights.

The British Act dispenses altogether with the registration of copyrights. The Australian Act, however, retains the copyright registers, but makes registration purely optional, except that certain additional summary remedies for infringement are only available to the registered owner of a right.

§ 68. "PATENTS."

LEGISLATION.

PATENTS ACT 1903-1909.

The Patents Act 1903 established one patents law and administration for the Commonwealth. It superseded the State Acts, except in regard to existing rights and pending proceedings. Existing State patents were not affected ; but a State patentee was enabled, if he wished, to obtain a Commonwealth patent (excepting any States in which the Commissioner was satisfied that the invention had been anticipated) for the unexpired term of his State patent. The patentee then had the option of surrendering his State patent ; but unless he did so it continued in force.

The Act was based chiefly on the English Act of 1883 and the amendments thereof. It contained some modifications adopted from the law of one or other of the States. A Patent Office was established, controlled (under the Minister) by a Commissioner of Patents, and provision was made for the appointment of Deputy Commissioners and examiners.

The Act contains provisions relating to the working of patents, and compulsory licences, taken from the English Act of 1902. When a patent has been in force for two years, any person interested may present a petition to the Commissioner alleging that the reasonable requirements of the public with respect to the invention have not been satisfied, and praying for the grant of a compulsory licence or in the alternative for the revocation of the patent. The Commissioner may refer the petition to the High Court, or the Supreme Court of the State in which the Patent Office is situated ; and if the Court finds that the reasonable requirements of the public have not been satisfied, it may order the patentee to grant licences on such terms as it thinks fit ; or, if it thinks that remedy inadequate, may revoke the patent. A further provision (repealed when the more elaborate clauses of 1909 were introduced) threw upon the patentee the onus of proving that reasonable requirements had been satisfied, where the Court found that the patent was worked or the patented article manufactured exclusively or mainly outside the Commonwealth.

The Patents Act 1909 adopts, with one important variation the provisions of the English Act of 1907 with regard to the working



of patents. After a patent has been in force for four years, any person may apply to the Court for an order declaring that the patented article or process is not manufactured or carried on to an adequate extent in the Commonwealth. Unless then, within a time limited in the order, the patentee proves that the patent is worked to an adequate extent in the Commonwealth, the effect of the order is (not, as in England, that the patent is void, but) that the patent is deemed not to be infringed by the manufacture or carrying on in the Commonwealth of the patented article or process, or by the vending within the Commonwealth of the patented article made within the Commonwealth. That is to say, the order of the Court enables any Australian manufacturer to manufacture and vend but does not enable foreign rivals of the patentee to import and vend.

The Patents Act 1909 also takes from the English Act of 1907 the provisions which invalidate certain restrictive conditions in contracts for the sale or lease of, or licence to use or work, patented articles or processes.

#### PATENTS TRADE MARKS AND DESIGNS ACT 1914.

During the continuance of the war, and for six months thereafter, the Governor-General is invested with extraordinary powers to deal with patents trade marks and designs. He may by regulation avoid or suspend a patent or licence held in the Commonwealth under Commonwealth law by an enemy subject; he may avoid or suspend registration and all rights conferred by the registration of any trade mark or design, the proprietor of which is an enemy subject; he may avoid or suspend any application made by an enemy subject for any right under the Act.

The Minister may by regulation be authorized to grant to non-enemy persons licences to use, exercise or vend, patented invention and registered designs which, under the foregoing provisions are liable to avoidance or suspension.

#### PATENTS (PARTIAL SUSPENSION) ACT 1916.

The operation of section 87 (a) of the Patents Act 1903-1909 which provides that where patents are not worked to an adequate extent in the Commonwealth, certain liabilities may be incurred, is suspended during the present war and six months afterwards.

### Nature of a Patent.

A patent of invention is sometimes described as an incorporeal personal property, a description which is sufficiently accurate for some purposes. It is, no doubt, personal property as distinguished from real property, and in that sense it may be described as a chattel. In *Steers v. Rogers*, (1893) A.C., 232, at p. 235, Lord HERSCHELL, L.C., said :—" What is the right which a patentee has or patentees have ? It has been spoken of as though a patent were a chattel, or analogous to a chattel. The truth is that letters taken do not give the patentee any right to use the invention—they do not confer upon him a right to manufacture according to his invention. That is a right which he would have equally effectually if there were no letters patent at all ; only in that case all the world would equally have the right. What the letters patent confer is the right to exclude others from manufacturing in a particular way, and using a particular invention."

The same doctrine has been laid down in the Supreme Court of the United States. " The franchise which the patent grants consists altogether in the right to exclude everyone from making using or vending the thing patented without the permission of the patentee. This is all he obtains by the patent. And when he sells the exclusive privilege of making or vending it for use in a particular place, the purchaser buys a portion of the franchise which the patent confers. He obtains a share in the monopoly, and that monopoly is derived from, and exercised under, the protection of the United States." (*Per* TANEY, C.J. in *Bloomer v. McQuewan*, 14 How., 539, at p. 549, cited by the Court in *Boesch v. Graff*, 133 U.S., 697, at p. 702. There is no doubt, also, that this franchise or monopoly has no effective operation beyond the territory of the State under whose laws it is granted and exercised : *Potter v. Broken Hill Proprietary Co Ltd*, (1906) 3 C.L.R., at p. 494.

### Enforcement of Patent Rights.

An action was brought in Victoria alleging an infringement in New South Wales, by the defendants, (a Victorian Company carrying on mining operations in New South Wales), of the plaintiff's New South Wales patent, and claiming an injunction and damages. The defendant by its defence alleged that the plaintiff's patent was invalid on various grounds. It was held by the High Court that the plaintiff's cause of action was not justiciable in Victoria. The

grant of letters patent for an invention is a grant of a right to exclude others from manufacturing or using the particular invention within the territory of the State under whose laws it is granted, and the title to the right must devolve, as in the case of land, according to the laws of that State. The grant of letters patent is an exercise of the sovereign power of the State, and therefore, as in the case of title to land, the validity of the grant is not examinable in the Courts of another State, except in cases where the question of that validity arises merely incidentally in an action otherwise cognizable by the Courts of that other State. The circumstances that patent rights cannot be enforced against a person who can prove that the invention was not novel does not exclude the operation of the above rule: *Potter v. Broken Hill Proprietary Co. Ltd.*, (1906) 3 C.L.R., 479.

### § 69. "DESIGNS."

#### LEGISLATION.

##### DESIGNS ACT 1906.

An office is established called "The Designs Office," and a sub-office is established in every State other than the State in which the Designs Office is established. There is to be a Registrar of Designs, and until otherwise determined the Commissioner of Patents is to act as such Registrar, assisted by one or more deputy registrars. After the commencement of the Act no application for the registration of a design under any State law is receivable, but all rights so acquired are preserved. The administration of the State Designs Acts is transferred to the Commonwealth. Copyright in a design means the exclusive right to apply the design, or authorize another person to apply the design, to the articles in respect of which it is registered. Copyright subsists in every design legally registered. The author of a design is the first owner of the design, and is the person entitled to make application for the registration of the design. Any new and original designs not previously published may be registered and thereon the certificates of registration are issued.

### § 70. "TRADE MARKS."

#### TRADE MARKS ACT 1905-1912.

#### LEGISLATION.

An office is to be established called "The Trade Marks Office," and a sub-office is to be established in every State other than the State in which the Trade Marks Office is established. The Minister

for Trade and Customs is charged with the execution of this Act. There is to be a Registrar of Trade Marks, and until the Governor-General otherwise determines the Commissioner of Patents is the Registrar of Trade Marks. A register of trade marks is to be kept. A trade mark must be registered in respect of particular goods or classes of goods as prescribed.

The administration of the State Trade Marks Acts is transferred to the Commonwealth, and the State laws are thereafter administered by the Commonwealth as far as is necessary for the purpose of completing then pending proceedings and giving effect to then existing rights. A registrable trade mark must consist of essential particulars with or without additional matter. It must contain at least one or more of the following essential particulars : —(a) The name of a company, individual, or firm represented in a special or particular manner ; (b) the signature of the applicant for registration or some predecessor in his business ; (c) an invented word or invented words ; (d) a word or words having no direct reference to the character or quality of the goods, and not being, according to its ordinary signification, a geographical name or a surname ; (e) any other distinctive mark, but a name, signature, or word or words, other than such as fall within the descriptions in the above paragraphs (a), (b), (c) and (d) shall not, except by order of the Registrar, Law Office, or Court, be deemed a distinctive mark. Authority is given for international and intercolonial arrangements for the reciprocal protection of trade marks.

### **Commonwealth Trade Mark.**

Two novel features of this Act are to be found in Part VII. relating to “ workers trade marks ” ; and Part VIII relating to “ the Commonwealth trade mark.” A worker or an association may, register a workers’ trade mark in the prescribed manner and shall thereupon be deemed the registered proprietor thereof, and be entitled to institute legal proceedings to prevent and recover damages for any contravention of this Part in respect of that trade mark. A workers’ trade mark is defined as a mark which is a distinctive device, design, symbol, or label registered by any individual Australian worker or association of Australian workers corporate or unincorporate for the purpose of indicating that articles to which it is applied are the exclusive production of the worker or of members of the association.

The Minister may cause to be designed and registered a trade mark called "The Commonwealth Trade Mark," consisting of a distinctive device or label bearing the words "Australian Labour Conditions." Upon the registration of the Commonwealth trade mark, the Minister shall be deemed to be the proprietor thereof, and shall be entitled to prevent its unauthorized application. No person can use the Commonwealth trade mark without the authority of the Minister. It may only be applied to goods included in or specified by a resolution passed by the Senate and the House of Representatives, that in their opinion the conditions as to the remuneration of labour in connection with the manufacture of the goods are fair and reasonable. The mark can only be used by the first proprietor of the goods, who has personally manufactured them, or who has paid for the labour other than his own in connection with their manufacture at least the minimum amount required to be paid to persons actually making the goods by an industrial award or order, or an industrial agreement under an industrial law.

#### **Workers' Trade Mark.**

Part VII. of the Trade Marks Act 1905 provided for the registration by any Australian worker or association of Australian workers, of a distinctive mark indicating the goods to which it was applied were the production of the worker or the members of the association, and imposed penalties for the false application of such a mark.

In the *Attorney-General for New South Wales v. Brewery Employees' Union*, (1908) 6 C.L.R., 469, it was held by a majority of the High Court (GRIFFITH, C.J., BARTON and O'CONNOR, JJ.; ISAACS and HIGGINS, JJ. dissenting) that this mark was not a "trade mark" within the meaning of the Constitution; that Part VII. was in substance an attempt to regulate the internal trade of the States, not within or incidental to any of the express powers conferred on the Parliament to regulate that trade; that Part VII. was therefore *ultra vires*, and, though its provisions, if limited to trade and commerce between the States, would be within the competency of the Commonwealth Parliament, it was impossible to separate that which is within from that which is without the power, and the whole was invalid.

A union of brewery employees, registered in New South Wales as a trade union and as an industrial union under the Industrial

Arbitration Act of that State, registered a mark or label in the register of workers' trade marks under part VII. of the Commonwealth Trade Marks Act 1905. The Attorney-General for that State, at the relation of several joint stock companies carrying on the business of brewing in that State, who were also joined as plaintiffs, instituted a suit in the High Court against the employees' union and the registrar of trade marks, for a declaration that the provisions as to workers' trade marks were invalid and that consequently the registration was invalid, and for an order cancelling the registration and an injunction restraining the Registrar from keeping a register of workers' trade marks.

The Chief Justice (Sir SAMUEL GRIFFITH), after reviewing the history of British trade mark legislation and the authorities, said :—

“ In my opinion it follows, from a consideration both of the Statute law of England and the Australian Colonies up to 1900 and of the authoritative expositions of the law with respect to trade marks in British Courts of Justice, that, where the term ‘ trade mark ’ as used in section 51 (xviii.) of the Constitution is to be regarded as a term of art or as a word used in popular language, it did not in that year denote every kind of mark which might be used in trade or in connection with articles of trade and commerce, but meant a mark which is the visible symbol of a particular kind of incorporeal or industrial property consisting in the right of a person engaged in trade to distinguish by a special mark, goods in which he deals, or with which he has dealt, from the goods of other persons. This concept includes, in my opinion, five distinct elements :—(1) A right which is in the nature of property ; (2) The owner of the right must be a person, natural or artificial, engaged in trade ; (3) The right is appurtenant or incident to the dealing with goods in the course of his trade ; (4) The owner has such an independent dominion over the goods to which the mark is to be affixed as to entitle him to affix it to them ; (It is not material whether this right is incident to his possession of the goods or arises under an agreement with the owner of them). (5) The mark distinguishes the goods as having been dealt with by some particular person or persons engaged in trade. . . . With regard to this species of property the power of the Parliament is absolute. They can prescribe the conditions on which it may be acquired, retained, or enjoyed ; they may possibly even prohibit its enjoy-

ment altogether ; but they cannot, by calling something else by the name of ' trade mark,' create a new and different kind of industrial property " : 6 C.L.R., at pp. 512-513.

The Chief Justice found the workers' trade mark to be wanting in all these five elements, and concluded :—" In my opinion, therefore, the workers' trade mark does not conform in any respect to the concept of a trade mark as used in the Constitution. Since, then, the Parliament has no power either to create new kinds of property, or new kinds of bodies politic, except as incidental to some express power, or to create new offences, except by way of sanction to a law already passed under some express power (*Lyons v. Smart*, 6 C.L.R., 143) there is nothing left upon which Part VII. of the Act can validly operate except the mark of an individual worker. In my judgment this part of the Act is an attempt to regulate the internal trade of the States. It does not fall within, and is not incidental to, any of the express powers conferred on the Parliament to regulate that trade, and, except so far as those powers extend, the power of the States is exclusive. I think, further, that the whole of the provisions of Part VII. are so bound up together that it is impossible to say that the Parliament would have enacted the provisions relating to individual workers without the rest. In my opinion, therefore, the whole of Part VII. is invalid " : *Per GRIFFITH*, C.J., 6 C.L.R., at p. 518.

Mr. Justice BARTON gave the following definition of a trade mark :—" What I take a trade mark to be then, using my own words, is this :—A mark which is placed on goods (1) to distinguish them as the goods of the person who uses the mark ; (2) exercising dominion over the goods, whether he has absolute ownership or only a contractual right to the possession ; (3) in the course of his trade ; and (4) exercising a right to the exclusive use of the mark " : 6 C.L.R., at p. 525. He found the workers' mark to be wanting in these essentials, and concluded :—" I am of opinion that the Constitution uses the expression ' trade mark ' in the sense it bore both in the United Kingdom and here, apart from Statute, in 1900. and that the power of legislation is co-extensive with that meaning. which does not cover the ' workers' trade mark ' " : *Per BARTON*, J., 6 C.L.R., at p. 530. Mr. Justice O'CONNOR defined the essentials of a trade mark as follows :—" First, the proprietor of a trade mark must have some trade or business connection with the goods, such as of owner, manufacturer, seller, or as having selected, packed,

or performed some other trade or business operation on them, and the mark must be used by him in the course of and in relation to that business connection. Secondly, the mark must be capable of distinguishing the particular goods on which it has been used from other goods of a like character in relation to which other persons have had a business connection of the like kind": 6 C.L.R., at p. 540.

His Honor's conclusion was:—"I take it, therefore, as established that the concept covered by the legal expression 'trade mark,' as used by the Legislature, the Courts, and the commercial community in England and Australia at the time of the passing of the Constitution, necessarily involved the two essentials I have mentioned. It would follow that the power conferred upon the Commonwealth Parliament to make laws in respect of trade marks extends only to trade marks having these essential qualities, and that it cannot extend to any mark used in trade which is wanting in any of those essentials. Nor can the Commonwealth Parliament give itself jurisdiction merely by declaring that a mark created by its authority for use in trade is a trade mark within the meaning of the Constitution. It cannot thus expand its powers by its own legislative act and so assume a larger control over the internal trade of a State than the Constitution has conferred on it": 6 C.L.R., *per* O'CONNOR, J., at pp. 540-541.

Mr. Justice ISAACS, however, thought that the attributes of a trade mark stressed in the judgments of the majority of the Court were not essentials of the concept, but accidental characteristics which, though usually attached to trade marks as recognized by English law, were not invariably so. He proceeded:—"Having cleared the term 'trade mark' of the non-essentials which have clung around it by reason of certain remedial procedure and the notions which inevitably root themselves in the soil of every day practice, and thence branch out until at times they obscure, the central object itself, we find that trade marks mean nothing more or less than marks used in trade and connected in some way with goods in order to identify the goods with persons, that is, to indicate their connection with some persons or class of persons who singly or in association have in some way dealt with or operated in relation to the goods. The British Parliament has acted upon this in section 62 of the Act of 1905 with regard to special trade marks, making exceptional provisions as to their registration, still treating them



as fairly within the ambit of trade marks. This enactment the Commonwealth Parliament has followed in section 22 of the Trade Marks Act 1905. If the Commonwealth Parliament could validly pass that section, it seems decisive of the present question. If it could not, then could the State Parliament enact it, and so create side by side with the Commonwealth Trade Marks Act another branch of trade marks law, recognized as such by the Imperial Parliament, but altogether outside Commonwealth control? I do not think this diversity of jurisdiction was intended by the Constitution. . . . My opinion is that the Commonwealth Parliament may give to any existing person or persons, or deprive them of, the right of holding or transferring trade marks. Part VII. of the Act does not create any artificial person for the purpose—and it is unnecessary to say that if it did that would be invalid—but it accepts certain independently existing facts:—(1) workmen single or associated; (2) a mark indicating their labour, and (3) their adoption of the mark; and then, with all these facts pre-existing, it permits registration and confirms or confers legal ownership and protects it. In this I see no excess of legislative authority.” *Per ISAACS, J.*, 6 C.L.R., at pp. 584, 585.

Mr. Justice HIGGINS also thought that the suggested essentials were accidents merely, evolved from Chancery practice. “It is clear,” he said, “that the words ‘trade mark’ were applied before 1900 to marks belonging to journeymen workers, to marks which did not identify any separate trading business, and which were assignable in gross. In short, the only attributes that I can find to be common to these goods in all their varying uses, the only essential *differentia* from other marks is this—the marks must be used to identify the commodities with some person or body of persons and for the purpose of attracting trade; and these attributes are all found in this ‘workers’ trade mark.’” He regarded the meaning of the words in 1900 as being a guide only, and not as conclusive:—“Under the power to make laws with respect to trade marks, I cannot see” he said, “why Parliament cannot, at the least, bring into the class of trade marks printed trade names and ‘get up’ of goods—rights in the nature of trade marks, things which were treated on the same principles as trade marks, but not hitherto called ‘marks’ in current language. What is committed to the Federal Parliament is not the *class* of things called trade marks, but the whole *subject* of trade marks. No doubt, we are to ascertain the meaning of ‘trade marks’

as in 1900. But having ascertained that meaning, we have then to find the extent of the power to deal with the subject of trade marks—or, what is the same thing, to find the meaning of the ‘power to make laws with respect to trade marks.’ The usage in 1900 gives us the central type; it does not give us the circumference of the power. . . . I am, therefore, of opinion that, even if the characteristics of the ‘workers’ trade mark’ did not bring it strictly within the class ‘trade marks’ as understood in 1900, there is nothing in Part VII. of the Act which transgresses the power conferred on the Federal Parliament ‘to make laws with respect to trade marks.’ ” *Per HIGGINS, J., 6 C.L.R., at pp. 608-616.*

## **51. (XIX.) Naturalization<sup>71</sup> and aliens :**

### **§ 71. “NATURALIZATION AND ALIENS.”**

#### **LEGISLATION.**

##### **NATURALIZATION ACT 1903.**

The naturalization laws of the States are superseded by this Act. From its commencement, it vests exclusively in the Commonwealth Government the right to issue certificates of naturalization, and declares that State certificates or letters of naturalization thereafter issued shall be of no effect. But it declares that persons who have previously obtained State certificates or letters shall be “deemed to be naturalized” under the Commonwealth Act.

An alien, to be entitled to apply for a certificate of naturalization, must be resident in the Commonwealth, must intend to settle in the Commonwealth, must not be an aboriginal native of Asia, Africa, or the islands of the Pacific (excepting New Zealand), and must have either (a) resided in Australia continuously for two years immediately preceding his application, or (b) obtained in the United Kingdom a certificate or letters of naturalization.

The Governor-General in Council may, with or without assigning any reason, in his discretion grant or withhold a certificate of naturalization in any case, as he thinks most conducive to the public good.

An alien woman who marries a naturalized person is deemed to be thereby naturalized. In view of the declaration in the Imperial Naturalization Act 1870, that the nationality of a wife is that of her husband, this provision seems unnecessary. An infant, not

being a natural-born British subject, whose father or mother holds a certificate of naturalization, or whose mother is married to a natural-born British subject or to the holder of a certificate of naturalization, is deemed to be naturalized if he has at any time resided in Australia with the father or mother.

The effect of a certificate of naturalization is to entitle the holder, in the Commonwealth, to all political and other rights, powers and privileges, and to subject him to all obligations, to which a natural-born British subject is entitled or subject to in the Commonwealth; except that, where the Constitution or laws of the Commonwealth or of a State distinguish between the rights of a natural-born and a naturalized subject, his rights are only those of a naturalized subject.

#### NATURALIZATION ACT 1917.

##### Conditions Precedent to Naturalization.

A person who was before the passing of this Act naturalized in a State or in a Colony which has become a State shall be deemed to be naturalized.

An applicant for naturalization shall produce in support of his application his own statutory declaration stating his name, age, birthplace, occupation and residence, the length of his residence in Australia, and such other particulars as are prescribed, and that he intends to settle in the Commonwealth.

Every applicant is required to advertise in the manner prescribed his intention to seek naturalization and produce to the Minister newspapers containing copies of the prescribed advertisement; produce certificates of character from three natural-born British subjects, two of whom are householders and one of whom is a justice of the peace, a postmaster, a teacher of a State school or an officer of police; and satisfy the Minister that he is able to read and write English.

##### Objections.

Any person may make representations to the Minister objecting to any person who has applied or has advertised his intention to apply for naturalization. Such representations shall be in the form of a statutory declaration. The contents of any statutory declaration filed with the Minister in pursuance of this section shall not be

disclosed to any person without the consent of the person making the declaration other than for the purposes of a prosecution for perjury.

The Governor-General shall consider the application and any representations made under the last preceding section, and may with or without assigning any reason, grant or withhold a certificate of naturalization as he thinks most conducive to the public good.

### **Renunciation of Original Allegiance.**

The Governor-General is not authorized to issue a certificate until he has received from the applicant the certificate of a Justice of the High Court, a Judge of the Court of a State, or a police, stipendiary or special magistrate, that the applicant has before renounced his allegiance to the country of which he was, at the time of making his application a subject or, in the case of an applicant who has obtained in the United Kingdom a certificate or letters of naturalization, the country of which he was at the time of his naturalization in the United Kingdom a subject, and taken an oath or affirmation of allegiance in the form in the Schedule to the Act.

### **Revocation.**

The certificate of naturalization may be revoked, provided it is proved to the satisfaction of the Governor-General that a certificate of naturalization has been obtained by any untrue statement of fact or intention; or the Governor-General is satisfied that it is desirable for any reason that a certificate of naturalization should be revoked.

### **COMMONWEALTH FRANCHISE ACT 1902.**

No aboriginal native of Australia, Asia, Africa, or the islands of the Pacific, except New Zealand, is entitled to have his name placed on an electoral roll unless so entitled under the Constitution Act, section 40, which preserves rights enjoyed under the laws of the States before Federation.

### **COMMONWEALTH ELECTORAL ACT 1917.**

Every naturalized British subject who was born in an enemy country is disqualified for voting at Commonwealth elections during the continuance of the war.

## INVALID AND OLD-AGE PENSIONS ACT 1908-1909.

The following persons are not qualified to receive old-age pensions, viz. : aliens ; naturalized subjects of the King who have not been naturalized for the period of three years next preceding the date of their pension claims, and Asiatics, except those born in Australia or aboriginal natives of Australia. Africa, the islands of the Pacific or New Zealand.

## WAR PRECAUTIONS ACT 1914-1916.

The Governor-General may by order published in the *Gazette* make provision for any matters which appear necessary or expedient with a view to the public safety and the defence of the Commonwealth, and in particular for prohibiting aliens, either generally or as regards specified places, and either absolutely or except under specified conditions and restrictions, from landing or embarking in the Commonwealth ; for deporting aliens from the Commonwealth ; for requiring aliens to reside and remain within certain places or districts ; for prohibiting aliens from residing or remaining in any areas specified in the order ; for requiring aliens residing in the Commonwealth to comply with such provisions as to registration, change of abode, travelling, trading or otherwise as are specified in the order ; for applying to naturalized persons, with or without modifications, all or any provisions of any order relating to aliens ; for requiring any person to disclose any information in his possession as to any matter specified in the order.

**Power to Deport Aliens.**

Robtelmes, a kanaka labourer, had been brought into Queensland under the pre-Federation Pacific Island Immigration Act (Queensland), (44 Vict., No. 17). In 1906 he was brought before a police magistrate sitting in Petty Sessions, and charged with being a Pacific Island labourer found in Australia before 31st December 1906, and reasonably supposed not to be employed under an agreement within the meaning of the Federal Pacific Island Labourers Act 1901. The magistrate was satisfied that the defendant had not been employed under agreement and ordered his deportation. He appealed from this order to the High Court, which dismissed the appeal : *Robtelmes v. Brennan*, (1906) 4 C.L.R.. 395.

The High Court held that the right to decide what aliens should or should not become members of the community was an attribute of sovereignty ; that the right of a nation to expel or deport foreigners

(whether alien friends or enemies) from the country was as unqualified and as undeniable as the right to exclude them from entering the country ; that this right was conferred upon the Commonwealth by virtue of the power to make laws with respect to (*inter alia* "aliens" ; and that the right to expel involved the right to do all things necessary to make the expulsion effective, among which was necessarily included the act of deportation, to the extent of the complete extrusion of the alien from the territorial borders of the State. The extra-territorial constraint necessarily consequent upon the act of expulsion was immaterial to the validity of the right of deportation. It was held further, that the right of expulsion was not limited to ordering the deportation of the alien to the place whence he came ; it was general and unlimited, and could be exercised by the deporting State in whatever manner and to whatever place was necessary for effective deportation.

The Chief Justice (Sir SAMUEL GRIFFITH), said in his judgment :

"The power to make such laws as Parliament may think fit with respect to aliens must surely, if it includes anything, include the power to determine the conditions under which aliens may be admitted to the country, the conditions under which they may be permitted to remain in the country, and the conditions under which they may be deported from it. I cannot, therefore, doubt that the Commonwealth Parliament has under that delegation of power authority to make any laws that it may think fit for that purpose and it is not for the judicial branch of the Government to review their actions, or to consider whether the means that they have adopted are wise or unwise. So far, therefore, the Statute appears to be *intra vires*, and one to which effect must be given. The most serious difficulty suggested was, however, that the deportation of a person from Australia will necessarily, owing to the geographical position of the Commonwealth, result in the imprisonment of the person deported beyond the territorial jurisdiction of the Colony. That is no doubt true, and it is equally clear that the legislature of the Commonwealth cannot make any laws which have effect as laws beyond its own territorial limits, that is to say, three marine miles from the coast, except so far as its laws are in force on board ships trading between different ports of the Commonwealth" : 4 C.L.R., at p. 404.

Referring to the case of *Attorney-General for Canada v. Cain and Gihula*, (1906) A.C., 542, decided only a few weeks previously,

in which the learned Lord who delivered the judgment of the Privy Council used the expression "deport him to the country whence he entered the Dominion," Sir SAMUEL GRIFFITH, said :—

"But it is clear that that cannot be the limit of the power. The deporting State has no authority beyond its own borders. All it can do is to extrude the alien. What becomes of him afterwards is for him, not for them. It may be that it would be unreasonable to take him against his will to some place which is not his own home, but the remedy must be sought elsewhere. I gave an instance in the course of the argument of the case of an alien, whom, for instance, the Swiss Confederation desired to expel from Switzerland. Suppose he was a Russian, or an Englishman, or a Spaniard, it is quite clear that they would have no authority to convey him through the territories of neighbouring powers to his original home. But that they have power to expel him from Switzerland is beyond all doubt what happens to him afterwards is a matter to be considered on other grounds. I am, therefore, of opinion, on the authority of this decision, that the Commonwealth had power to pass this Act; that the justice who gave the adjudication had power to order the appellant's deportation; and that the deportation will be lawful. What will happen afterwards, where he will be taken, and under what circumstances, are matters that must be determined by other authorities, but I think it will be found that the law of the Empire sufficiently provides for the safety of Pacific Islanders who are being carried on the waters of the Pacific Ocean. I have only one other observation to make with regard to the point of restraint beyond the limits of the Commonwealth. It may reasonably be assumed—of course from one point of view it is a rather large assumption—that every alien who chooses to come into a sea-girt country knows that he is liable to be deported and that he can only be deported by sea; and that he therefore agrees as a term of his admission to the sea-girt country that such restraint may be exercised upon him beyond the territorial limits of that State for the purpose of his deportation as may be necessary. Regarded from this point of view the necessary restraint is made with his consent." *Per GRIFFITH C.J.*, 4 C.L.R., at pp. 406-407.

In *Attorney-General for Canada v. Cain and Gilhula*, (1906) App. Cas., 542, referred to above, it was decided by the Privy Council that "one of the rights preserved by the supreme power in every State is the right to refuse to permit an alien to enter that State,

to annex what conditions it pleases to the permission to enter it and to expel or deport from the State, at pleasure, even a friendly alien, especially if it considers his presence in the State opposed to its peace, order, or good government, or to its social or material interests." For that proposition the judgment cited *Vattel, Law of Nations*, book I., section 231 ; book II., section 125. Later on in the judgment it is said :—"The power of expulsion is, in truth, but the complement of the power of exclusion. If entry be prohibited, it would seem to follow that the Government which has the power to exclude should have the power to expel the alien who enters in opposition to its laws."

The same doctrine has been definitely established in the United States of America. In *Chae Chan Ping v. United States*, 130 U.S., 581, the Supreme Court of the United States affirmed the validity of a former Act of Congress excluding Chinese labourers from the United States. In that case FULLER, C.J., said :—"Those labourers are not citizens of the United States ; they are aliens. That the Government of the United States, through the action of the legislative department, can exclude aliens from its territory is a proposition which we do not think open to controversy. Jurisdiction over its own territory to that extent is an incident of every independent nation. It is a part of its independence. If it could not exclude aliens, it would be to that extent subject to the control of another power." . . . "To preserve its independence, and give security against foreign aggression and encroachment, is the highest duty of every nation, and to attain these ends nearly all other considerations are to be subordinated. It matters not in what form such aggression and encroachment come, whether from the foreign nation acting in its national character, or from vast hordes of its people crowding in upon us. The Government, possessing the powers which are to be exercised for protection and security, is clothed with authority to determine the occasion on which the powers shall be called forth ; and its determination, so far as the subjects affected are concerned, is necessarily conclusive upon all its departments and officers." In the later case of *Fong Yue Ting v. United States* 149 U.S., 698, the same doctrine was approved.

51. (xx.) Foreign corporations<sup>72</sup> and trading or financial corporations formed within the limits of the Commonwealth :



**§ 72. "CORPORATIONS."****LEGISLATION.****AUSTRALIAN INDUSTRIES PRESERVATION (ISAACS) ACT 1906.**

The Australian Industries Preservation Act 1906, sections 5 (1) and 8 (1) assumed to be passed in the exercise of Commonwealth power over corporations provided :—

Section 5 (1) Any foreign corporation, or trading or financial corporation formed within the Commonwealth, which, either as principal or agent, makes or enters into any contract, or engages or continues in any combination—

- (a) with intent to restrain trade or commerce within the Commonwealth to the detriment of the public, or
- (b) with intent to destroy or injure by means of unfair competition any Australian industry the preservation of which is advantageous to the Commonwealth, having due regard to the interests of producers, workers, and consumers, is guilty of an offence.

Section 8 (1) Any foreign corporation, or trading or financial operation formed within the Commonwealth, which monopolizes or attempts to monopolize, or combines or conspires with any person to monopolize, any part of the trade or commerce within the Commonwealth, with intent to control, to the detriment of the public, the supply or price of any service, merchandise, or commodity, is guilty of an offence.

Other sections of the same Act passed in the undoubted exercise of powers conferred by the Constitution, section 5 (1) relating to inter-state and external trade and commerce were as follows :—

Section 4 (1) Any person who, either as principal or as agent, makes or enters into any contract, or is or continues to be a member of or engages in any combination, in relation to trade or commerce with other countries or among the States—

- (a) with intent to restrain trade or commerce to the detriment of the public ; or
- (b) with intent to destroy or injure by means of unfair competition any Australian industry the preservation of which is advantageous to the Commonwealth, having due regard to the interests of producers, workers and consumers, is guilty of an offence.

Section 7 (1) Any person who monopolizes or attempts to monopolize, or combines or conspires with any other person to monopolize, any part of the trade or commerce with other countries or among the States, with intent to control, to the detriment of the public, the supply or price of any service, merchandise, or commodity, is guilty of an offence.

15B (1) "If the Comptroller-General believes that an offence has been committed against this part of this Act, or if a complaint has been made in writing to the Comptroller-General that an offence has been committed against this part of this Act and the Comptroller-General believes that the offence has been committed, he may by writing under his hand require any person whom he believes to be capable of giving any information in relation to the alleged offence to answer questions and to produce documents to him or to some person named by him in relation to the alleged offence.

(2) No person shall refuse or fail to answer questions or produce documents when required to do so in pursuance of this section.

### Limits of Federal Power.

In the cases of *Huddart Parker & Co. v. Moorehead*; *Appleton v. Moorehead*, (1908) 8 C.L.R., 330, it was held by the whole Court that paragraph 51 (xx.) of the Constitution does not empower the Federal Parliament to create corporations, but is limited to legislation as to foreign corporations and as to trading and financial corporations created by State law. (Previous dicta suggesting the contrary, in *Jumbunna Coal Mine Co. v. Victorian Coal Miners' Association*, 6 C.L.R., at pp. 334, 355, must now be considered as of no authority).

It was further held by a majority (ISAACS, J. dissenting) that the paragraph does not empower the Federal Parliament to control the operations of corporations which lawfully engage in trade and commerce within a State. As to what the paragraph *does* empower the Federal Parliament to do, the dicta of the Justices forming the majority do not altogether agree. The Chief Justice and Mr. Justice BARTON thought that it gave power to forbid corporations from entering into any particular field of intra-state commerce, or to impose conditions upon their entry into such field, though not to control their conduct within the lawful sphere of their operations. Mr. Justice O'CONNOR thought that it was limited to legislation for the recognition of corporations as legal entities within the Commonwealth. Mr. Justice HIGGINS thought that it extended to regulating the status and capacity of corporations and the conditions on which they might carry on business.

The case involved the validity of sections 5 and 8 of the Australian Industries Act 1906. This Act, which was directed against contracts, combinations and monopolies in restraint of trade, was, as to most of its provisions, limited (in accordance with the limits of the federal power with respect of trade and commerce) to matters

relating to trade and commerce "with other countries and among the States." But sections 5 and 8, which dealt with offences *by corporations*, purported to extend to trade and commerce generally—including intra-state trade and commerce—the Parliament having acted on the view that these provisions could be supported as laws in respect of corporations, independently of the trade and commerce power.

On 22nd September 1908 the Comptroller-General of Customs, in writing, stated that he believed offences had been committed against section 5 (1) (a) and 8 (1) (relating to corporations), Part II. of the Australian Industries Preservation Act 1906 (as amended by the Australian Industries Preservation Act 1907) in connection with the trade in coal, and he called upon Huddart Parker & Co. Ltd., a company duly formed under the laws of Victoria, to answer in writing several questions.

On the same day the Comptroller-General, in writing, required William Thomas Appleton, the manager of the above-named Company, to answer the same questions, stating in this case that he believed that offences had been committed against sections 4 (1) (a) and 7 (1) relating to inter-state trade. Both the company and Appleton refused to answer the questions, and they were charged on information by R. W. Moorehead, an officer of customs, with having refused to answer the questions. The informations were heard at the Court of Petty Sessions at Melbourne on 28th September 1908. and in each case the defendant was fined £5.

The defendants appealed to the High Court on the grounds :— That sections 5 (1) (a) and 8 (1) of the Australian Industries Preservation Act 1906 were unconstitutional and *ultra vires*, and, therefore, proceedings could not be lawfully taken under section 15B of such Act (as amended), based upon a statement of the belief of the Comptroller-General that an offence had been committed against such sections. That the provisions of sections 5 and 8 were not really laws with respect to corporations but were laws with respect to trade and commerce ; that section 15B was invalid.

It was decided by the whole Court that sections 4 (1), 7 (1) and 15B of the Australian Industries Preservation Act 1906 (as amended by the Australian Industries Preservation Act 1907), so far as applicable to inter-state trade were *intra vires* the Commonwealth Parliament and valid. It was further decided by the Court that

the inquiry authorized by section 15B was not inconsistent with the right to trial by jury conferred by section 80 of the Constitution. The Court also held that such an inquiry by an officer was not an exercise of the judicial power of the Commonwealth and was therefore valid.

The majority of the Court held that sections 5 and 8 penalizing corporations were *ultra vires* and void ; that they were not laws in respect of corporations, but an unconstitutional attempt to control intra-state trade and commerce.

In the result the conviction of Huddart Parker & Co., on the information under sections 5 and 8 relating to corporations engaged in the internal trade of a State was quashed. The conviction of W. T. Appleton, for refusing to answer questions relating to interstate trade was confirmed.

The Chief Justice (Sir SAMUEL GRIFFITH), in his judgment said :

“ Sections 4 and 7 are limited in terms to matters in relation to trade and commerce with other countries and among the States, and it is not suggested that these enactments are not within the first of the powers enumerated in section 51 of the Constitution. Sections 5 and 8 are not so limited as to subject-matter, but are limited to foreign corporations and trading and financial corporations formed within the Commonwealth—adopting the language of pl. xx. of section 51. It is common ground that sections 5 and 8, as framed, extend to matters relating to domestic trade within a State, and the question is whether the power to make laws with respect to ‘ foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth ’ extend to the governance and control of such corporations when lawfully engaged in domestic trade within the State. If it does, no limit can be assigned to the exercise of the power. The Commonwealth Parliament can make any laws it thinks fit with regard to the operation of the corporation, for example, may prescribe what officers and servants it shall employ, what shall be the hours and conditions of labour, what remuneration shall be paid to them, and may thus, in the case of such corporations, exercise complete control of the domestic trade carried on by them. In short, any law in the form ‘ No trading or financial corporation formed within the Commonwealth shall,’ or ‘ Every trading and financial corporation formed, etc., shall,’ must necessarily be valid, unless forbidden by some other provision of the Constitution.

“ It is not seriously disputed that the words of pl. xx., if they stood alone, might be capable of such a construction, but the appellants contend that it is not the true one. The respondent relies on the literal meaning of the words, which, he says, confer an express power which is not to be cut down by implication. In support of this view he contends that the words are large enough to include the creation of trading and financial corporations, and that the power to create a corporation implies a power to attach to the corporation when created any condition whatever that Parliament may think fit.

“ It may be that this consequence would follow so far as regards the internal affairs of a corporation so created whether it would or would not also follow as to their dealings with strangers. But I am of opinion that the words in question do not on their face purport to deal with the creation of corporations. In the case of foreign corporations it is obvious that the Parliament cannot create them. The formation and regulation of corporations in general is one of the matters left to the States and in my judgment the words ‘formed within the limits of the Commonwealth’ mean formed under State laws. They may be large enough to include corporations formed by the Commonwealth itself within territory under its exclusive jurisdiction, and corporations created by the Commonwealth itself as instruments of government; but an express power is not necessary for either purpose

“ In my opinion the meaning of pl. xx. is that in the case as well of trading and financial corporations formed within the Commonwealth as of foreign corporations the Commonwealth must take them as it finds them and may make such laws with respect to their operations as are otherwise within its competence”: 8 C.L.R. at pp. 347-349.

Sir SAMUEL GRIFFITH then cited *Grand Trunk Railway Co. of Canada v. Attorney-General of Canada* (1907) A.C. 65, in which the question was whether a Dominion Statute, prohibiting railway companies created under Dominion law from contracting out of liabilities to pay damages for injuries to their servants, was within the competence of the Dominion Parliament as railway legislation, or was in substance an interference with “property and civil rights,” a subject reserved to the Provincial Legislatures; and

after quoting from the judgments of the High Court in *The King v. Barger*, 6 C.L.R., at p. 79, and the *Union Label Case*, 6 C.L.R., at pp. 502-503, he proceeded :—

“ Is then the enactment that trading and financial corporations shall not enter into certain contracts or combinations relating to domestic trade wholly within a State, a necessary and proper means of carrying into execution some other power expressly granted by the Constitution—in this case a power to make laws with respect to such corporations ?

“ The contracts and combinations mentioned are governed by State law, and are either lawful or unlawful under that law. If the Commonwealth Parliament can declare an act of a trading or financial corporation in relation to domestic trade which is lawful under State law to be unlawful, it can, *e converso*, make lawful a similar act of such a corporation which is unlawful under State law. A more flagrant invasion of the spheres of the domestic law of trade and commerce and the domestic criminal law can hardly be conceived. . . .

“ In my judgment the words of pl. xx. are not clear and unequivocal, but are open to two constructions, and, applying the principles which I have stated, I think that they ought not to be construed as authorizing the Commonwealth to invade the field of State law as to domestic trade, the carrying on of which is within the capacity of trading and financial corporations formed under the laws of the State. In other words, I think that pl. xx. empowers the Commonwealth to prohibit a trading and financial corporation formed within the Commonwealth from entering into any field of operation, but does not empower the Commonwealth to control the operations of a corporation which lawfully enters upon a field of operation, the control of which is exclusively reserved to the States. For these reasons I think that sections 5 and 8 are beyond the constitutional power of the Commonwealth and that the appeal of Huddart, Parker & Co. should be allowed.” *Per* GRIFFITH, C.J., 8 C.L.R., at pp. 352, 354.

Mr. Justice BARTON stated at length his views as to the enactments, in substantial agreement with the Chief Justice, and concluded :—

“ I am of opinion, therefore, that sections 5 (1) (a) and 8 (1) of these Acts, in so far as they deal with the domestic trade of the

States, are in no wise incidental or ancillary to the execution of section 51 (xx.) of the Constitution, and that the invasion of that sphere is prohibited by the Constitution. Hence, I am bound to hold that these provisions are invalid, and that the company is entitled to succeed." *Per* BARTON, J., 8 C.L.R., at p. 366.

Mr. Justice O'CONNOR, in the course of his judgment, said :—

" In the light of the circumstances it may fairly be taken that the framers of the Constitution intended by the sub-section under consideration to confer on the Parliament of the Commonwealth just that power which was wanting in the legislative bodies then existing in Australia—the power of making a uniform law for regulating the conditions under which foreign corporations, and trading or financial corporations created under the laws of any State, would be recognized as legal entities throughout Australia. As part of that power there would be necessarily implied the authority to impose on those corporations all such conditions on admission to recognition as would be appropriate or plainly adapted to the object of the sub-section and not forbidden by the Constitution. (See the judgments of this Court in the *Jumbunna Case* 6 C.L.R. 309). Recognition of a corporation as a legal entity involves a recognition of its right to exercise throughout Australia its corporate functions in accordance with the law of its being, that is, the law by which the foreign or State law gave it existence as a legal body. Recognition may be absolute or on conditions. It is unnecessary here, even if it were possible to make a comprehensive statement of the matters which might be the subject of such conditions, but it may be stated generally that Parliament is empowered to enact any law it deems necessary for regulating the recognition throughout Australia of the corporations described in the section, and may, as part of such law, impose any conditions it thinks fit, so long as those laws and the conditions embodied in them have relation only to the circumstances under which the corporation will be granted recognition as a legal entity in Australia. It may, for instance, prohibit altogether the recognition of corporations whose constitutions do not provide certain safeguards and securities for payment of their creditors. It may impose conditions on recognition to attain the same ends. As a preliminary to recognition it may insist upon compliance with any conditions it deems expedient for safeguarding those dealing with the corporation. In the effecting of objects within these limits it must have the right to encroach on State powers to such an extent

as it may deem necessary. But when once recognition has been granted—when once the corporation has, in Australia, the status of a legal entity—the limit of the power conferred by the sub-section is reached. The corporation then becomes a legal entity within the Commonwealth, subject to the laws of the Commonwealth and of the States in the same way as any other legal entity. In respect of trade carried on entirely within the limits of any one State it is within the cognizance of State laws and State administration in the same way and to the same extent as any other legal entity within the State would be in the like circumstances. By such interpretation only can full effect be given to the power conferred by the sub-section on the Parliament without derogating from the power to control its own internal trade and commerce which the Constitution leaves exclusively in the hands of the State.” *Per O’CONNOR, J.*, 8 C.L.R., at pp. 373-374.

Mr. Justice HIGGINS agreed that this was a law “ with respect to ” trade and commerce—not to corporations ; and he said :—

“ But, it is asked, what then is the exact scope of the power in sub-section (xx.) ? I think it is my duty to face this question, but I do not wish to be taken as giving any final or exhaustive definition. In the first place, this sub-section (xx.) does not give any power to incorporate companies. Such power of incorporation as the Federal Parliament has, is implied, not express, not direct and independent, but ancillary, incidental to its other powers. This sub-section applies only to corporations which have been formed abroad, or (if trading or financial) by the States. But there is ample scope provided for the Federal Parliament by this sub-section. It can regulate such companies as to their status, and as to the powers which they may exercise within Australia, and as to the conditions under which they shall be permitted to carry on business. . . .

“ The Federal Parliament can, in my opinion, prescribe what capital must be paid up, probably even how it must have been paid up (in cash or for value, and how the value is to be ascertained) what returns must be made, what publicity must be given, what auditing must be done, what securities must be deposited. The Federal Parliament controls as it were the entrance gates, the tickets of admission, the right to do business and to continue to do



business in Australia; the State Parliaments dictate what acts may be done, or may not be done, within the enclosure, prescribe laws with respect to the contracts and business within the scope of the permitted powers. An Act which forbids to corporations, and punishes, a contract which is within the permitted powers, is not an Act 'with respect to' corporations as such, it is an Act with respect to contracts. . . .

"The Federal Parliament can, as it were, regulate the terms of admission into a field and of remaining therein, but it cannot make a law imposing a penalty for picking a turnip. . . . The Federal Parliament can regulate corporations as to status, capacity, and the conditions on which business is permitted. But it is for the State Parliament to regulate what contracts or combinations a corporation may make in the course of the permitted business. . . .

"In fine, if the Statute of Limitations or the Statute of Frauds or the common law as to contracts is to be altered or repealed, even as to corporations, it must be altered or repealed by the State Parliament, which can deal with private persons as well as with corporations, and can secure uniform treatment." *Per HIGGINS, J.*, 8 C.L.R., at pp. 412-414.

Mr. Justice ISAACS, while agreeing that the power did not include the creation of corporations, took an entirely different view of what it did include:—

"The creation of corporations and their consequent investiture with powers and capacities was left entirely to the States. With these matters, as in the case of foreign corporations, the Commonwealth Parliament has nothing to do. It finds the artificial being in possession of its powers, just as it finds natural beings subject to its jurisdiction, and it has no more to do with the creation of the one class than with that of the other.

"But laying aside creative power, what is left? It cannot be merely the power to legislate for the corporations with relation to inter-state and foreign commerce. That, as already indicated, is conferred to the fullest extent by the first sub-section, and to confine paragraph (xx.) to that would give no meaning to its very definite words.

“ Again, to restrict its operation to internal company regulation would be absurd. Apart from the inherent improbability of investing the national authority with merely subordinate functions while retaining to the State the superior power of incorporation which, effectively exercised, could go far to nullify the inferior power, there are serious practical difficulties. I am unable, therefore, to accept the argument that what the Constitution has handed over to the Federal Parliament is simply the body of company law. That would include all the prohibitory and creative provisions contained in the State Statutes ; it would also include the power to alter the conditions of a company's existence, which is equivalent to creation, and to annihilate the corporation altogether—which I think is equally with creation, outside the region of federal competency., . . . The power does not look behind the charter, or concern itself with purely internal management, or mere personal preparation to act ; it views the beings upon which it is to operate in their relations to outsiders, or, in other words, in the actual exercise of their corporate powers, and entrusts to the Commonwealth Parliament the regulation of the conduct of the corporations in their transactions with or as affecting the public. Many of the matters that in one aspect are internal—such as balance-sheets, registers of members, payment of calls, &c.—may in another aspect and in certain circumstances be important elements in connection with outward transactions, and have a direct relation to them, and so fall incidentally within the ambit of federal power. The same may be said of legal proceedings, remedies, and so on, including winding up proceedings so far as necessary to satisfy creditors, but not so far as extinction. But whether any given provision is part of the federal power or not must, as I view it, depend on whether it includes or is necessarily incidental to the control of the conduct of the corporations in relation to outside persons. This follows from the process of reasoning and elimination that the language itself forces upon us when effect is given to every word. . . .

“ To some extent the grant of power has admittedly overstepped the line of demarcation separating jurisdiction as to interstate and foreign trade from that concerning purely intra-state trade. See the judgment of the learned Chief Justice in *The King v. Barger*, 6 C.L.R., 41, at p. 69. And once that line is passed, where is the new line to be consistently drawn, except where I have drawn it ? I have shown that on the affirmative side the words

are not satisfied by mere recognition ; and on the negative or prohibitory side, what is the authority for drawing it at exclusion which, besides recognition, is also admitted by my learned brother's view ? Nothing in the Constitution lends itself to that result—no solitary authority English or American gives any countenance to it. So far as they go the American cases are opposed to it. In *Pembina Mining Co. v. Pennsylvania*, 125 U.S., 181, at p. 186. FIELD, J., basing his statement on several authorities, says :—‘ The absolute power of exclusion includes the right to allow a conditional and restricted exercise of its corporate powers within the State.’ ” *Per ISAACS, J.*, 8 C.L.R., at pp. 394-396, 402.

### PROPOSED CONSTITUTIONAL AMENDMENTS RELATING TO CORPORATIONS.

On 26th April 1911, the following proposed amendment of section 51 (xx.) was submitted to the people of the Commonwealth by referendum :—

51. (xx.) “ Corporations including :—

- (a) The creation, dissolution, regulation, and control of Corporations ;
- (b) Corporations formed under the law of a State (except any Corporation formed solely for religious, charitable, scientific or artistic purposes, and not for the acquisition of gain by the Corporation or its members) including their dissolution, regulation and control ; and
- (c) Foreign Corporations including their regulation and control.

This amendment failed to secure the necessary constitutional ratification, *supra* p. 21.

On 31st May 1913, the following proposed constitutional amendment was submitted to the people :—

51. (xx.) “ Corporations, including :—

- (a) the creation, dissolution, regulation, and control of corporations ;
- (b) Corporations formed under the law of a State, including their dissolution, regulation, and control ; but not including municipal or governmental corporations, or any corporation formed solely for religious, charitable, scientific, or artistic purposes, and not for the acquisition of gain by the corporation or its members ; and
- (c) foreign corporations, including their regulation and control.”

This proposed amendment failed to secure the necessary constitutional ratification, p. 23.

**Objections Stated.**

Federalists object to the Commonwealth Parliament receiving special and discriminating powers of legislation which may be directed against, for the purpose of penalizing, corporations, and regulating them by laws which do not apply to private individuals. Under the same circumstances of trade and commerce or industry, the laws which apply to private individuals should be applicable to corporations. There should be no discriminating legislation against corporations, otherwise there would be, in the same State, two sets of laws relating to trade and commerce and industry, one by the State, applicable to private individuals, and the other by the Federal Parliament, applicable to corporations. Such a power vested in the Federal Parliament would be unfederal and would lead to confusion and anomalies inconsistent with the Federal system. On the other hand Federalists would be quite prepared to support an amendment of the Constitution enabling the Federal Parliament to prescribe uniform company laws authorizing the creation and winding up of companies which desire to carry on business operations in all the States of the Commonwealth. This is a real need and would be a practical improvement.

**51. (xxl.) Marriage<sup>72A</sup> :****§ 72A. "MARRIAGE."**

There has, as yet, been no Commonwealth legislation passed with respect to marriage. This paragraph was mentioned incidentally in the High Court in *Attorney-General for New South Wales v. Brewery Employees Union*, 6 C.L.R., at pp. 585, 601, 610.

**Prohibited Degrees.**

The marriage laws of England were part of the body of English law introduced into the Colony of New South Wales on its first settlement. Marriages within the prohibited degrees prescribed in 28 Henry VIII. c. 7, are therefore voidable during the lifetime of the parties, by the Supreme Court of that State in its matrimonial causes jurisdiction. Decision of the Supreme Court, *Major (f.c. Miller) v. Miller*, (1906) 6 S.R. (N.S.W.), 24, affirmed. *Per GRIFFITH, C.J.* : —“ There can be no doubt that amongst the laws introduced upon the settlement of the Colony of New South Wales were the marriage laws of England. There can be no doubt, also, that amongst the prohibited degrees prescribed in the Act, 28 Henry VIII. c. 7, is

the case of a man who marries his wife's daughter. That has always been accepted as the law of Australia, and I see no reason to doubt that it is so. The only doubt that has been thrown upon it now arises from the fact that when Australia was settled there was no Court that could declare such a marriage to be void, and it had, some time before the settlement, been determined by the English Courts that, as recited in the Act 5 & 6 William IV. c. 54, marriages within the prohibited degree were voidable only by Ecclesiastical Courts in the lifetime of the parties. There are only three possible alternatives:—(1) That such marriages were void in Australia; (2) that they were valid and cannot be impeached at all; and (3) that they were, as in England, voidable, but, owing to the circumstances of the country, there was no immediate available means open to persons seeking to have such a marriage declared void. The third view is the one that has always been accepted, and, I think, is the sound one." BARTON and O'CONNOR, JJ., concurred. *Miller v. Major*, (1906) 4 C.L.R., 219.

51. (XXII.) Divorce<sup>72b</sup> and matrimonial causes; and  
 ' in relation thereto, parental rights, and  
 the custody and guardianship of infants:

#### § 72B. "DIVORCE."

There has, as yet, been no Commonwealth legislation under this head. The paragraph was incidentally referred to in the High Court in *Attorney-General of New South Wales v. Brewery Employees Union*, 6 C.L.R., at pp. 602, 610. The necessity of a Federal law relating to domicile has been frequently commented upon in divorce and matrimonial cases, both by the judges and counsel.

51. (XXIII.) Invalid<sup>73</sup> and old-age pensions:

#### § 73. "INVALID AND OLD-AGE PENSIONS."

##### LEGISLATION.

##### INVALID AND OLD-AGE PENSIONS ACT 1908-1912.

Provision is made for the appointment of a Commissioner of Pensions who, subject to the control of the Minister, is the general administrator of the Act. There is a Deputy Commissioner in each State. Subject to the Act, every person who has attained the age

of 65 years, or who, being permanently incapacitated for work, has attained the age of 60 years, is, whilst in Australia, qualified to receive an old-age pension. The Governor-General may by proclamation declare that the age at which women shall be qualified to receive an old-age pension shall be sixty years, instead of sixty-five (A proclamation accordingly was made in November 1910).

The following persons are not qualified to receive an old-age pension, namely:—Aliens; Asiatics (except those born in Australia), or aboriginal natives of Australia, Africa, the Islands of the Pacific, or New Zealand and a person whose accumulated property in or out of Australia exceeds £310 in capital value.

Among the necessary conditions to the receipt of a pension are the following:—the applicant must be of good character, must have resided continuously in Australia for at least 20 years, must not have deserted wife, husband or children without just cause.

A scheme of invalid pensions applicable to persons above the age of 16 years who are permanently incapacitated from work by reason of an accident or illness, did not come into operation until a date fixed by proclamation (19th November 1910).

The amount of a pension may not exceed the rate of £32/10/ per year in any event, nor can it be at such a rate as will make the pensioner's income together with pension exceed £58/10/- per year. A scale of deductions from the maximum rate of pension on account of accumulated property and other sources of income is given in Part V. of the Act. Persons over the age of 16 years and permanently blind are entitled to pensions.

#### INVALID AND OLD-AGE PENSIONS ACT 1917.

This Act amends the definition of income under the principal Act by providing that money paid by the Commonwealth to any pensioner by reason of his dependence on a member of the Forces within the meaning of the War Pensions Act 1914-1916, or money paid by the Commonwealth in pursuance of an allotment made by members of the Forces within the meaning of that Act or money paid by way of war pensions to any person who is a dependent within the meaning of the War Pensions Act shall not be deemed to be income within the meaning of the Invalid and Old-age Pensions Act, so as to reduce the claims of the pensioner.

51. (xxiv.) The service<sup>74</sup> and execution throughout the Commonwealth of the civil and criminal process and the judgments of the courts of the States :

§ 74. "SERVICE AND EXECUTION."

LEGISLATION.

SERVICE AND EXECUTION OF PROCESS ACT 1901-1912.

This legislation deals with the service, in other parts of the Commonwealth, of writs of summons and other process issued by the Courts of a State ; the execution, in other parts of the Commonwealth, of warrants issued by the Courts, judges and magistrates of a State ; and the enforcement, in other parts of the Commonwealth, of the judgments of the Courts of a State. A writ of summons may be defined as, in effect, a written command from the Crown to a defendant to enter an appearance in the action : *Dicey, Conflict of Laws*, page 234.

As regards the service of writs of summons, the Act follows the Australian Civil Process Act 1886, passed by the Federal Council of Australasia, which in turn is based to a large extent upon English law and practice as to service out of the jurisdiction (*Cf. Common Law Procedure Act 1852, c. 76, sec. 18 ; Judicature Rules, O. XI, r. 1*).

A writ of summons issued out of any State Court of Record (defined to include any Court which is required to keep a record of its proceedings) may, if it bears the prescribed endorsement, and a statement of the time limited by the Act for appearance, be served on the defendant in any other State or part of the Commonwealth.

On the return of the summons it must be made to appear to the Court or Judge that the writ was personally served on the defendant ; or in the case of a corporation served on its principal officer or manager or secretary within the State or part in which service is effected ; or that reasonable efforts were made to effect personal service thereof on the defendant, and that it came to his knowledge or in the case of a corporation, that it came to the knowledge of such officer as aforesaid (in which case it shall be deemed to have been served on the defendant.)

If the defendant appear the originating Court may, if it thinks fit, on the application of the plaintiff, order the defendant to give security for costs. Where no appearance is entered or made by

the defendant, the originating Court may, if the suit is in respect of a subject-matter—land or property—within the State, or a contract made or broken or an act done within the State, or if the defendant was, when his liability arose, within the originating State, or (in a matrimonial cause) is domiciled in the originating State, the Court may give the plaintiff liberty to proceed; and the judgment will have the same force and effect as if the writ had been served in the said State.

Other process in a suit may, subject to the Rules of the Supreme Court of the State in which the process is issued, be effected in the same way, and will have the same force and effect, as if served in that State. A summons for an offence, issued on a sworn information, or (by leave of the issuing Court or magistrate) a subpoena to give evidence in any civil or criminal proceeding, may be similarly served in other parts of the Commonwealth, and proceedings may be taken to enforce attendance.

The provision for the execution of warrants is based on the old system, embodied in the English Justices Acts, and later in the Fugitive Offenders Act, of backing warrants. A warrant, issued in one State for the apprehension of a person who is charged with an offence or has disobeyed an order of a Court, may be indorsed by a justice in the State where the defendant is to be arrested, and may be executed accordingly. Provision is also made for arrest on a provisional warrant, pending the arrival and indorsement of the original warrant.

The provision for the enforcement of judgments is based on the Australasian Judgments Act 1886, passed by the Federal Council of Australasia. A certificate of the judgment may be registered in the appropriate Court of the State in which it is to be enforced and proceedings may then be taken on the certificate as if it were a judgment of the Court.

Section 10 of the Act, providing that a defendant served with a writ may apply to the originating Court for an order requiring the complainant to give security for cost, is valid. *McGlew v. N.S.W. Malting Co. Ltd.* (1918), 25 C.L.R., p. 416.

### **Extra-territorial Service.**

Before the passing of this Act the question of the competency of the jurisdiction of the Colonial and State Courts to deal with persons served with process outside their territorial limits was governed partly by local legislation and partly by the rules of



private international law. In Australia, before Federation, a Court could be empowered by the laws of its own Colony, such as the Common Law Procedure Act, to entertain an action against a defendant out of the jurisdiction in a neighbouring Colony and under certain conditions to render judgment against him.

A judgment entered under such an Act within the originating Colony was by the decision given in the case of *Ashbury v. Ellis*, (1893) App. Cas., 339, held to be valid and it could be enforced against the person or property of the defendant within that Colony. But it was not necessarily valid outside the limits of that Colony. In other words, the Courts of other Colonies were not bound to recognize its validity, and to allow their process to be used for the purpose of enforcing it against the property or person of the defendant within their jurisdiction. Whether they would do so or not, depended upon the rules of private international law, as these have been laid down in the English Courts; and not upon the law of the Colony in which the judgment was rendered.

Turning now to the Federal Service and Execution Act it must be noted that there is a great difference between the legislative power of the Commonwealth Parliament which passed this Act and the Colonial Parliaments which passed the Common Law Procedure Acts. Under the Federal Act it is provided (1) That a writ of summons issued out of any Court of Record in one State may be served on a defendant in another State (section 4); (2) That if the defendant does not appear to such a writ, the plaintiff may, under certain conditions, obtain leave to proceed with the action up to judgment (section 11); (3) That a judgment so obtained shall have the same force and effect as if the writ had been served in the State in which it was issued (section 12). The Federal Parliament has power to authorize State Courts to issue such commands, to persons in other States, and it has done so. It could hardly be contended that if the defendant choose to disobey the command, the Court out of which it is issued has no jurisdiction over him. A judgment obtained in default of appearance under the provisions of Colonial laws authorizing service out of the jurisdiction, was not necessarily regarded as valid by the Courts of other Colonies. But under the Federal law the position is entirely different. The Federal Parliament has power to pass laws, with respect to the particular subjects confided to it, which bind everyone in the Commonwealth. A defendant served with a writ under a law of the Commonwealth is bound to obey the command in the writ. The Federal law must

mean this if it means anything. If he is bound by a valid law to obey the command in the writ, he is subject to the jurisdiction of the Court which issues it. If this is so, that Court, on all the established principles of private international law, can render against him a judgment which is not only valid in the State of issue, but must be recognized as such in every Court of the Commonwealth. The Service and Execution of Process Act expressly provides for this, for by section 12 it is enacted that "when a judgment is given or made against a defendant who has been served with a writ of summons under this Act, such judgment shall have the same force and effect as if the writ has been served on the defendant in the State . . . in which the writ was issued." If a writ is served within a State, the Courts of that State clearly have a jurisdiction that is recognized by foreign Courts: *Commonwealth Law Review*, vol. II., p. 64.

Attention is drawn to these considerations in consequence of a judgment of Mr. Justice COHEN given in the Supreme Court of New South Wales in the case of *Blunt v. Collingwood Tin Mine Co.*, 20 W.N., 158. His Honor there suggested that section 4 of the Federal Act was intended, not to extend the jurisdiction of the State Court, but to authorize the service in another State of a writ of summons in cases where the particular State Court out of which the writ issues, has jurisdiction, apart from the provisions of the Service and Execution of Process Act. In *Pringle v. Musgrove*, 20 W.N., 280, Mr. Justice PRING stated that he was not prepared to follow the decision given in *Blunt's Case*. The restricted view suggested by Mr. Justice COHEN has not been adopted by any other Court.

51. (xxv.) The recognition<sup>75</sup> throughout the Commonwealth of the laws, the public Acts and records, and the judicial proceedings of the States :

# § 75. "RECOGNITION."

## LEGISLATION.

### STATE LAWS AND RECORDS RECOGNITION ACT 1901.

All Courts within the Commonwealth are required to take judicial notice of Acts of Parliament of any State, of the seal of any State, and of the signatures and seals of various State officials

and the seals of State Courts. It also provides for the proof, in all Courts within the Commonwealth, of various public documents and records of the States, and of judicial proceedings of State Courts. It enjoins all Courts to take judicial cognizance of the signatures of Ministers of State of the Commonwealth and officials named in the Act and other officials named in proclamations issued by the Governor-General such as State Commandants, and the Commonwealth Statistician.

51. (xxvi.) The people of any race<sup>76</sup> other than the aboriginal race in any State, for whom it is deemed necessary to make special laws :

§ 76. "THE PEOPLE OF ANY RACE."

LEGISLATION.

There has been no legislation by the Federal Parliament which derives its main support from this paragraph, though there are a few enactments to which it might be called in aid.

By the Naturalization Act 1903, aboriginal natives of Asia, Africa, or the islands of the Pacific (excepting New Zealand) are excluded from the privilege of naturalization ; and by the Commonwealth Franchise Act 1902 the same persons, and also aboriginal natives of Australia, are excluded from the right to vote at elections for the Federal Parliament.

By the Invalid and Old-age Pensions Act 1908-1912, section 3, Asiatics (unless born in Australia) and aboriginal natives of Australia, Africa, the islands of the Pacific, or New Zealand, are disqualified for pensions.

By the Post and Telegraph Act 1901, section 16, contracts made on behalf of the Commonwealth for the carriage of mails must contain a condition that only white labour shall be employed ; and by the Sugar Bounty Acts (now repealed) and other Acts granting bounties, the payment of bounty is made conditional on only white labour being employed.

For the Pacific Island Labourers Act 1901-1906, see notes to section 51 (xxx.), *infra*.

### Deportation and Expulsion.

This paragraph was mentioned in *Robtelmes v. Brennan*, 4 C.L.R., 395, 415, as one of the subject-matters of Federal legislative power which might be relied upon to support the deportation of a kanaka. See notes to section 51 (xix.), at p. 486, *supra*.

## 51. (xxvii.) Immigration<sup>77</sup> and emigration :

### § 77. "IMMIGRATION."

#### LEGISLATION.

#### IMMIGRATION ACT 1901-1912.

This Act (which is based to some extent on the pre-Federation Acts of the States), prohibits the immigration into Australia of certain classes of persons defined as "prohibited immigrants."

### Prohibited Immigrants.

The following are prohibited immigrants :—

(a) Any person who fails to pass the dictation test ; i.e., to write out, when asked, not less than fifty words dictated by an officer in any prescribed language. Until languages are prescribed by regulation, any language authorized by the original Act of 1901 (i.e. any European language) is deemed to be a prescribed language.

(b) Any person not possessed of the prescribed certificate of health ;

(c) any idiot, imbecile, feeble-minded person, or epileptic ;

(d) Any person suffering from a serious transmissible disease or defect ;

(e) Any person suffering from pulmonary tuberculosis, trachoma, or any loathsome or dangerous communicable disease, either general or local ;

(f) Any person suffering from any other disease or mental or physical defect, which from its nature is, in the opinion of an officer, liable to render the person concerned a charge upon the public or upon any public or charitable institution ;

(g) Any person suffering from any other disease, disability, or disqualification which is prescribed ;

(ga) Any person who has been convicted of a crime and sentenced to imprisonment for one year or more, unless five years have elapsed since the termination of the imprisonment ;

(gb) Any person who has been convicted of any crime involving moral turpitude, but whose sentence has been suspended or shortened conditionally on his emigration, unless five years have elapsed since the expiration of the term for which he was sentenced ;

(gc) Any prostitute, procurer, or person living on the prostitution of others."

### **Exceptions.**

The following persons are excepted from the provision of the Act :—(h) any person possessed of a certificate of exemption as prescribed in force for the time being ; (i) members of the King's regular land or sea forces ; (j) the master and crew of any public vessel of any Government ; (k) the master and crew of any other vessel landing during the stay of the vessel in any port of the Commonwealth (provided that proper identification cards for the whole crew have been produced to an officer on demand ; and provided also that any absentee from a muster of the crew, held before the vessel leaves, may be presumed to be a prohibited immigrant) ; (l) any person duly accredited to the Government of the Commonwealth by the Imperial or any other Government or sent by any Government on any special mission.

### **Deportation.**

A convicted prohibited immigrant is liable, in addition to or substitution for imprisonment, to be deported from the Commonwealth on the order of the Minister. An alien convicted of any crime of violence against the person may also be deported at the expiration of his sentence.

### **Penalties.**

Besides penalties against a prohibited immigrant, and persons abetting his entry, the master, owners, agents and charterers of the vessel from which any prohibited immigrants enter the Commonwealth are liable to a penalty of £100 for each prohibited immigrant.

### **Inspection Abroad.**

To prevent the hardship of the rejection of immigrants on arrival, on account of physical or mental unfitness, the amending Act of 1912 provides for the establishment of Medical Bureaux outside the Commonwealth, at which intending immigrants may be examined and receive certificates of health.

## CONTRACT IMMIGRANTS ACT 1905.

This Act imposes penalties on the introduction into Australia of immigrants under contract to perform manual labour in Australia, unless the contract has been filed with the Minister and approved by him. The Minister's approval is to be given only if in his opinion—(a) the contract is not made in contemplation of or with a view of affecting an industrial dispute; and (b) there is difficulty in the employer's obtaining within the Commonwealth a worker of at least equal skill and ability (but this paragraph does not apply where the contract immigrant is a British subject either born in the United Kingdom, or descended from a British subject there born); and (c) the remuneration and other terms and conditions of employment are as advantageous to the contract immigrant as those current for workers of the same class at the place where the contract is to be performed.

The Governor-General in Council may, by order published in the *Gazette*, forbid, either absolutely, or with qualifications, the immigration of contract immigrants intended to be brought to Australia in connection with or in contemplation of an industrial dispute; and during the currency of such order, any such contract immigrants are deemed to be prohibited immigrants.

## EMIGRATION ACT 1910.

This Act deals with the emigration from Australia of young persons and aboriginal natives. It is made an offence to take out of the Commonwealth except under permit (a) any child under contract to perform theatrical, operatic, or other work abroad; (b) any European child unless in charge of a European adult; or (c) any aboriginal native. Contracts by children or aboriginals to leave the Commonwealth are void unless filed with and approved by the Minister; and it is an offence to enter into such a contract with a child or an aboriginal without forthwith filing a copy. Power is given to search vessels, and the master owner and agent of a vessel who has reason to suspect that any passenger is a prohibited emigrant is required to notify the Customs.

**Power to Exclude Immigrants.**

The power to exclude immigrants, or to expel and deport them after entry—whether they are aliens or British subjects—is included in the power to make laws with respect to immigration. The

exercise of this power under the Immigration Restriction Act 1901 and amending Acts, which are now collectively cited as the Immigration Act 1901-1912, has led to a series of decisions by the High Court as to the meaning and scope of this sub-section.

### Entry into the Commonwealth.

Though every person who enters the Commonwealth is not necessarily an immigrant, entry into the Commonwealth is *prima facie* immigration.

### Strangers.

The word "immigrant" involves the idea that the immigrant is a stranger to the country to which he comes. The question of who is a "stranger" and who is an "Australian" has been dealt with in several cases, and it has been settled that neither the rules of nationality nor the rules of domicile are applicable to test the question whether a person entering the Commonwealth is an "immigrant" or an Australian "coming home."

### The Dictation Test.

Ah Foo was charged with being, on the 26th day of January 1903, a prohibited immigrant, who, when asked to do so by an officer, failed to write at dictation and sign in the presence of the officer a passage of fifty words in length in an European language directed by the officer. It was alleged that he had failed to comply with the requirements of the Immigration Restriction Act 1901, section 3. The Full Court of Victoria held that before an offence under section 3 (a) can be constituted it must be proved that the officer selected a coherent and continued passage of fifty words; that he dictated them and asked the immigrant to write them and sign his name and that the immigrant failed to do so. Proof by the officer that he dictated a lesser number of words and that the immigrant failed to write the words dictated to him is not sufficient: *Christie v. Ah Foo*, (1904) 29 V.L.R., 533; 25 A.L.T., 189; 10 A.L.R., 34.

In the case of *Chia Gee v. Martin*, (1906) 3 C.L.R., 644, prohibited immigrants discovered as stowaways on board a ship at Fremantle were brought ashore in custody of the police. It was proved that the men arrived in Australia as stowaways on board a ship trading between Singapore and Fremantle and journeyed in the ship to the end of the voyage. It was held that, in order to prove that a person entering the Commonwealth is an "immigrant"

within the meaning of the Act, it is not necessary to prove that he intended to remain in the Commonwealth for any definite period. The Chief Justice (Sir SAMUEL GRIFFITH), in a judgment in which the rest of the Court (BARTON and O'CONNOR, JJ.) concurred, said :

“ There was, obviously, evidence that the men did not come to the Commonwealth merely intending to enter its territory as members of a crew of a ship coming here and going away again in the ordinary course of their business. . . . They had entered the Commonwealth voluntarily, they were found here, and they failed to comply with the test. They therefore brought themselves clearly within the terms of section 5, sub-section (2) of the Act. All the ingredients of the offence are clearly proved. It was suggested that the term ‘ immigrant ’ in this Act means a person ‘ who arrives in the Commonwealth with the intention of becoming a permanent resident. ’ The word may have that meaning in some contexts. When you are contrasting immigrants with members of a crew, that may be a convenient distinction to take, but the purpose of this Act is clearly to prevent entry into the Commonwealth ; the test is one to be applied on entry, and the question whether a man is an immigrant must be a matter capable of being determined then and there. It would be reducing the Act to a nullity if the test of whether a man were an immigrant or not was to be some intention in his mind, which intention the Commonwealth authorities might have no means of discovering. . . . The term ‘ immigrant ’ is clearly satisfied by the act of coming into the Commonwealth ” : 3 C.L.R., at p. 654.

### **Persons Formerly Domiciled in a State.**

Two Chinese, Jong Hing and Jong Nie who alleged that they had formerly resided for several years in Victoria, and had left that Colony on a visit to China, were, on their return, prevented from landing in Melbourne by the Commonwealth officer appointed under the Immigration Restriction Act 1901 to examine persons suspected of being prohibited immigrants. They were detained in custody on board the ship in which they had arrived, and, when the ship called at the port of Sydney on its return journey to China, applications were made on their behalf to the High Court for writs of *habeas corpus* directing the captain of the ship to bring the applicants before the Court to be dealt with according to law. The writs were directed to be issued, and on their return by the captain with the



bodies of the applicants, no one appeared to oppose their discharge. On behalf of the applicants it was submitted that the officer should have been satisfied on the evidence that the applicants were domiciled in Victoria within the meaning of sub-section (n) of the Immigration Restriction Act 1901, which was as follows :—“ Any person who satisfies an officer that he has formerly been domiciled in the Commonwealth or in any Colony which has become a State.

Domiciled it was argued, meant permanently residing in Australia in the popular sense : *Davies v. West Australia*, 2 C.L.R.. 29. The High Court (GRIFFITH, C.J., and Justices BARTON and O'CONNOR), held that *prima facie*, every man is entitled to be at liberty, and therefore, unless some reason is shown why a person in custody should remain there, he ought to be discharged. “ The applicants ” said the Chief Justice, “ have been brought up to be dealt with according to law, and no one appears to show cause why they should be kept in custody. We have, therefore, no alternative but to order their discharge.” *The King v. Lindberg*; *Ex parte Jong Hing*, (1905) 3 C.L.R., at p. 94.

By the amending Immigration Act 1905, sub section (n) of the Act of 1901 was repealed, so that persons formerly domiciled in Australia upon going abroad and returning are no longer exempt from the dictation test.

The case of *Christie v. Ah Sheung*, (1906) V.L.R., at p. 323, was that of a Chinaman who had resided in Victoria from 1881 to 1901 (except for two visits to China), he became naturalized in Victoria, again went to China in 1901 and remained there for five years. On returning to Victoria in 1906 he failed to pass the dictation test and was convicted of being a prohibited immigrant. He applied to the Supreme Court of Victoria for a writ of *habeas corpus*. On the return of the writ, Mr. Justice CUSSEN found that Ah Sheung was a domiciled Victorian subject of the King, and not an immigrant within the meaning of the Act, and ordered his release. In his judgment he said :—“ If he has not really lost his domicile by his visit to China, and there is no evidence that he has, and I find he has not, if he is really entitled in Victoria to the privileges flowing from naturalization, and it cannot be denied that he is entitled. then, in my opinion, he cannot be prevented from entry under an Act dealing with immigration and immigrants, unless there is in such Act some *intra vires* provision leading to the conclusion that

for the purposes of such Act, immigration is equivalent to entry. In my opinion there is no such provision. I think it can hardly be contended that immigration in the Constitution is synonymous with entry into the Commonwealth, and it is hardly necessary to add that the Parliament cannot, by any law, extend the meaning of the words used in the Constitution. It will have been observed that, so far, I have only relied on the applicant's naturalization incidentally as one of the elements tending to show as a fact that he was and is a domiciled Victorian, and that this was not a case of immigration " : *In re Ah Sheung*, 27 A.L.T., at p. 189.

This decision was appealed from to the High Court : *Attorney-General v. Ah Sheung*, (1906) 4 C.L.R., 949. The Chief Justice, Sir SAMUEL GRIFFITH, delivering the judgment of the Court, said :—

" We are not disposed to give any countenance to the novel doctrine that there is an Australian nationality as distinguished from a British nationality, so that, while the term ' immigration ' as used in section 51 of the Constitution admittedly includes the power of exclusion of British subjects in general, it would not extend to persons of Australian nationality, whatever that may mean.

" But we think that there is much force in the view which commended itself to CUSSEN, J., although not argued before us, that the term ' immigration ' does not extend to the case of Australians—to use for the moment a neutral word—who are merely absent from Australia on a visit *animo revertendi* who in this view should be considered Australians, so as not to be immigrants on their return ; whether the right to admission should depend on domicile in the ordinary legal acceptation of that term, or on *bona fide* residence ; whether the Commonwealth Parliament has power, as an incident of its power to regulate immigration, to prescribe tests for determining whether a person seeking to enter the Commonwealth falls in fact within the suggested exception, and incidentally to appoint a special tribunal to determine the question ; whether it did so by the Act of 1901, and, if so, whether the provisions of that Act are applicable to the present case, are all matters deserving serious consideration " : 4 C.L.R., at p. 592.

The question of the identity of the respondent with the naturalized Ah Sheung being then in issue in a second prosecution which

was pending, the case was ordered to stand over for further consideration and argument, if necessary. Ultimately identity was established and the appeal was abandoned.

In *Ah Yin v. Christie*, (1907) 4 C.L.R., 1428, it was decided that the fact that an infant who was born out of Australia, and who had never been in Australia, had a derivative Australian domicile due to his father's domicile in Australia, did not prevent his being a prohibited immigrant. The Chief Justice, Sir SAMUEL GRIFFITH, said :—

“ There is no doubt that for certain purposes minors acquire what may be called a derivative domicile. It is not suggested there is any hitherto recognized rule of international comity under which such a derivative domicile confers upon an alien a right to enter another country, but it is said that such a right necessarily follows from the principles of the law of domicile. The application of that law has, so far as I know, been confined to the determination of questions of civil status, questions of capacity to contract marriage, and questions of succession to personal property. The question involved in this case is quite different. It is the question of the right of a stranger to claim admission to a foreign country. That is a matter depending upon political, not upon civil, status. . . . The Commonwealth has, under the Constitution, power to exclude any person, whether an alien or not. The acquisition of a domicile of choice by a person coming from abroad to any country depends, then, upon the permission given by that country to enter it and make it his home. When such domicile has been acquired, certain consequences follow as to him, and possibly as to those persons who, though absent, take a derivative domicile through him. But these consequences are quite irrelevant to the question of the extent or conditions of the permission given to the particular person to enter and remain in the country. Permission given to a person to enter a country does not necessarily imply permission to his wife and family to enter the country. . . . I think that any person who seeks to enter the Commonwealth from abroad is, *prima facie*, an immigrant within the meaning of the Act ”: 4 C.L.R., at pp. 1431-1432.

See also the cases on the power to expel and deport aliens, cited in the notes to section 51 (xix.), *supra*.

In *Potter v. Minahan*, (1908) 7 C.L.R., 277, the facts were that the illegitimate son of a Victorian woman, who had his original home in Victoria, was at the age of 5 years taken by his father, a Chinese, to China, where he remained for 26 years. It appeared that he had never abandoned his Victorian home and domicile. It was held that on his return to Victoria he was not an immigrant within the meaning of the Act and that he could not be excluded.

The Chief Justice (Sir SAMUEL GRIFFITH) said :—

“ It was contended that the word ‘emigration’ as used in section 51 must include every case of departure from the Commonwealth, and that the word ‘immigration’ should have a correspondingly wide meaning. Possibly the word ‘emigration’ as used in that paragraph may include all cases of departure, since a State cannot control the movements of a man after he has left its territory, so that every departing person is in one sense an emigrant. But the reason for adopting such an extended construction is that any other construction would render the power nugatory. The same reason does not apply to the word ‘immigration’ . . . In my opinion the word ‘immigration’ as used in the Constitution does not mean mere physical entry into the Commonwealth although the fact of entry is, if no more appears, sufficient *prima facie* evidence that the person entering is an immigrant ” : 7 C.L.R., at pp. 285-286.

“ I do not think that the present case can be determined by the mere application of the rules either of nationality or of domicile. There is no doubt that a British subject coming to the Commonwealth from another part of the British Dominions may be an immigrant within the meaning of the Constitution. But anterior, both in order of thought and in order of time, to the concepts of nationality and domicile is another, upon which both are founded, and which is, I think, an elementary part of the concept of human society, namely, the division of human beings into communities. From this it follows that every person becomes at birth a member of the community into which he is born, and is entitled to remain in it until excluded by some competent authority. It follows also that every human being (unless outlawed) is a member of some community, and is entitled to regard the part of the earth occupied by that community as a place to which he may resort when he thinks fit. In the case of *Musgrove v. Chun Teeong Toy*, (1891) A.C., 272, it was held that an alien (though an alien friend) has no legal right to enter a country to which he is not a national. Yet,

unless he is outlawed from human society, he must be entitled to enter some community. So, by process of exclusion, we ascertain at least one part of the world to which every human being, not an outlaw, can claim the right of entry when he thinks fit.

“ At birth he is, in general, entitled to remain in the place where he is born. (There may be some exceptions based upon artificial rules of territoriality). If his parents are then domiciled in some other place, he perhaps acquires a right to go to and remain in that place. But, until the right to remain in or to return to his place of birth is lost, it must continue, and he is entitled to regard himself as a member of the community which occupies that place. These principles are self-evident, and do not need the support of authority. . . . It is not necessary in the present case to inquire whether the right to regard a particular part of the earth as ‘ home ’ can be acquired otherwise than by birth ; or whether it can be lost by a change of residence ; or whether, if lost, it can be re-acquired : and in any of those cases, by what means ; or whether the right of entry *prima facie* extends to all the Dominions of the State of which he is a national.

“ The return of such a person to his native land after temporary absence has never, so far as I have any acquaintance with the English language, been described as ‘ immigration.’ That word is not a technical term of art, and when used in section 51 (xxvii.) of the Constitution must receive its ordinary signification unless the context requires some other meaning to be adopted. . . .

“ The respondent is a person who, upon the evidence, was entitled by the circumstances of his birth to regard Victoria as his home. Upon the facts as found by the magistrate he has not himself, nor has anyone by whose acts he is bound, done anything to deprive him of that right, or to confer on him a right to enter or remain in any other part of the world, except so far as his British nationality may confer any such right. It follows in my judgment, that, although entry into another part of the British Dominions might and probably would have been immigration, his return to the Commonwealth was not immigration within the meaning of section 51 (xxvii.) of the Constitution ” : 7 C.L.R., at pp. 288-290.

Mr. Justice BARTON expressed a doubt whether the mere fact of birth in Australia was not enough to take the respondent out of the scope of the immigration power, and “ whether the grant includes

the right to prohibit the entry of those who are subjects of the Crown born within our bounds and who, to adapt a phrase of Lord WATSON's may be called Australian-born subjects of the King": 7 C.L.R., at p. 294. But, like the Chief Justice, he rested his decision on the ground that the respondent had never made China his permanent home or abandoned his Australian home.

Mr. Justice O'CONNOR adopted, as the definition of immigration the words of Mr. Justice CUSSEN in the case of *Ah Sheung v. Lindberg*, (1906) V.L.R., at p. 332 :—" In its ordinary meaning immigration implies leaving an old home in one country to settle in a new home in another country, with a more or less defined intention of staying there permanently, or for a considerable time." He thought that birth in Australia was not conclusive ; that it was only *prima facie* evidence of the respondent's home in infancy being in Australia, and that it might be shown that the home of infancy had been abandoned and exchanged for another. But he agreed, on the facts, that the respondent in returning to Australia was coming back to a home which he had never abandoned.

Justices ISAACS and HIGGINS both thought that respondent was an immigrant, on the ground that he had abandoned his Australian home.

### **Meaning Unalterable.**

It was pointed out by the Chief Justice (Sir SAMUEL GRIFFITH) in the *Union Label Case*, 6 C.L.R., at p. 501, that whereas some of the enumerated subject matters of Federal power (*e.g.* telegraphic services) might with advancing civilization extend to new developments relating to the same subject-matter (*e.g.* wireless telegraphy), the meaning of the term " immigration " could never alter, however the methods of bringing persons within the geographical limits of the Commonwealth might be extended.

### **Control over State Governments.**

In *Attorney-General of New South Wales v. Collector*, 5 C.L.R., at p. 833, Sir SAMUEL GRIFFITH mentioned the immigration power amongst others, as an example of a power of such a nature that its effective exercise manifestly involves control of some operation of a State Government, so that the doctrine of the immunity of State instrumentalities from Federal control would have no application to that operation. The power of the States to restrict inter-state migration is also limited by section 92 of the Constitution. See

notes on that section, *infra*; and *The King v. Smithers*, (1913) 16 C.L.R., 99.

### Imperial Law and Treaties.

In *Chia Gee v. Martin*, 3 C.L.R., 649, the suggestion that the Immigration Restriction Act 1901 was invalid because not in conformity with *Magna Carta* was dismissed as "not one for serious refutation." The objection that the Act was invalid as being in conflict with treaties was characterized as a question which might perhaps be raised for decision some day, but was not raised now, because there was no treaty in existence which was relevant.

The power conferred by the Immigration Act 1901-1912, section 16, and the regulations made thereunder, authorizing officers to inquire and determine whether any person is a prohibited immigrant is valid. Similar inquiries are authorized for the enforcement of the Customs Act 1901-1910, the Audit Act 1901, and the Census and Statistics Act 1905. *Per O'CONNOR, J.*, (1909) 8 C.L.R. at p. 377.

## 51. (xxviii.) The influx<sup>78</sup> of criminals:

### § 78. "INFLUX."

#### LEGISLATION.

The provisions of the Immigration Act 1901-1912 dealing with the immigration of criminal undesirables have been summarized in the note on that Act: section 51 (xxvii.), *ante*.

#### Influx.

The term "influx of criminals" implies the entry of criminals into the Commonwealth, as distinguished from the passing of criminals from one State into another.

Trade and intercourse between the States by the Constitution, section 92, is absolutely free. There is, therefore, a limit on the power both of the Commonwealth and the States to stop any person crossing the border, except, of course, fugitives from justice or from quarantine, which question was referred to and tested in the case of *The King v. Smithers*; *Ex parte Benson*, (1912) 16 C.L.R., 99.

An Act passed by the Legislature of New South Wales known as the Influx of Criminals Prevention Act 1903 by section 3 provided that any person (other than a person who has been resident in New South Wales at or prior to the commencement of this Act), has before or after such commencement, been convicted in any

other State . . . of an offence for which in such State he was liable to suffer death, or to be imprisoned for one year or longer ; and if before the lapse of three years after the termination of any imprisonment suffered by him in respect of any such offence, such person comes into New South Wales, he shall be guilty of an offence against this Act." An inhabitant of Victoria who had been convicted there of being a person having insufficient lawful means of support, which offence may, by the law of Victoria, be punished by imprisonment for twelve months, having within three years after the termination of the imprisonment suffered by him in respect of such offence come into New South Wales, was convicted there of an offence against the section above quoted. Held, that the last-mentioned conviction was bad ; by GRIFFITH, C.J. and BARTON, J., on the ground that the power of the Parliament of a State to make laws for the exclusion of persons whom it thinks undesirable immigrants, is limited to the making of laws for the promotion of public order, safety or morals, and that the exclusion of a person convicted of such an offence as that of which the accused was convicted in Victoria was not within the power as so limited ; by ISAACS, J. and HIGGINS, J., on the ground that the section of the New South Wales Act was an interference with freedom of " intercourse " between the States within the meaning of section 92 of the Constitution, and was therefore invalid. *The King v. Smithers ; Ex parte Benson*, (1912) 16 C.L.R., 99.

51. (xxix.) External affairs<sup>79</sup> :

§ 79. " **EXTERNAL AFFAIRS.**"

LEGISLATION.

FUGITIVE OFFENDERS (IMPERIAL) ACT 1881.

In the case of *Ex parte W. N. Willis*, which was heard in the Supreme Court of Western Australia on 18th July 1905, the applicant had been arrested on provisional warrant issued under section 16 of the Fugitive Offenders Imperial Act 1881. He was arrested in that State for an offence alleged to have been committed in New South Wales ; he applied for discharge under a writ of *habeas corpus* which was made returnable before the Full Court, consisting of the Chief Justice, Mr. Justice PARKER and Mr. Justice McMILLAN. Counsel for the applicant argued that part II. of the Fugitive Offenders Act had no application between various Australian States, and



that it had ceased to apply since the Federation of Australia was established. The Court held that the point taken by counsel was fatal to the warrant. The Act was only to apply to groups of British possessions to which, by reason of their contiguity or otherwise, it might seem expedient to apply the same. The Act had been applied to various British possessions, but "British possessions," as defined by the Statute, meant any part of His Majesty's dominions exclusive of the United Kingdom, the Channel Islands, and the Isle of Man, and all territories which were under one Legislature, and "Legislature" meant the central Legislature. "British Possession," therefore meant a territory or place which was under one central Legislature. Australia, being now under one central Legislature, was a British possession within the meaning of the Act, and the various States which prior to the Federation of Australia were separate British possessions, were now under one central Legislature, and thereby had ceased to be separate British possessions within the meaning of the Act. The accused was accordingly discharged : 7 W.A.L.R., 247.

In the case of *Ex parte D. A. Small*, heard before Mr. Justice REAL, in Queensland, on 14th September, 1905, a similar point arose with regard to part I. of the Fugitive Offenders Act. The warrant in that case had been issued in South Africa, and had been endorsed by the Governor of Queensland in alleged pursuance of section 3 of part I., which provides for the endorsement of a warrant by the Governor of a British possession. His Honor was of opinion that the various Acts which were supposed to be performed by the Governor of the possession under the Fugitive Offenders Act had, since the Commonwealth came into existence, to be performed by the Governor-General of the Commonwealth and not by the Governor of the State. This prisoner was held by a warrant endorsed by the Governor of the State and not by the Governor-General of the Commonwealth, and was no longer in legal custody, the time having elapsed during which he could be held on remand. The prisoner was discharged : 3 *Commonwealth Law Review*, Part I. at pp. 14, 17.

In *re McKelvey*, (1906) V.L.R., 304, the question was raised as to whether the judges or justices of a State could still exercise jurisdiction under the Fugitive Offenders (Imperial) Act 1881. It was held by the Full Court of Victoria that the State of Victoria had not ceased to be "British possession" within the meaning of

the Fugitive Offenders (Imperial) Act 1881, since the passing of the Commonwealth of Australia Constitution Act and the proclamation of the Commonwealth. Therefore, the jurisdiction conferred upon the judges or justices of the peace mentioned in section 30 (4) of the Fugitive Offenders (Imperial) Act 1881 could still be exercised in Victoria by a Judge of the Supreme Court of Victoria, or a justice of the peace for every bailiwick of Victoria having the like jurisdiction as one of the magistrates of the Metropolitan Police Court in Bow Street, London.

The case of *McKelvey v. Meagher* subsequently came before the High Court on appeal, when the decision of the Full Court of Victoria was affirmed : (1906) 4 C.L.R., 265.

The Chief Justice (Sir SAMUEL GRIFFITH), referring to section 32 of the Fugitive Offenders Act, said :—

“ I think a ‘ central legislature,’ as distinguished from a ‘ local legislature,’ means a central legislature which has power to deal with the subject-matter of the Act—such matters as are involved in the administration of the Act, including the administration of justice within the possession. So that, if a new form of Constitution is granted under which a new legislature, central in one sense, it is true—is established, but with authority not extending to the criminal law or the extradition or rendition of fugitive offenders, then such legislature is not a central legislature within the meaning of the Act.

“ Either the Parliament of the Commonwealth has no power to deal with the matter, and therefore cannot be a ‘ central legislature ’ within the meaning of the Act ; or, if the Parliament of the Commonwealth can deal with the matter and may be a ‘ central legislature,’ the existing law is preserved by section 108 of the Constitution, since the Commonwealth Parliament has not dealt with the matter, so far as the surrender of fugitive offenders to other parts of the British dominions outside the Commonwealth is concerned.”

“ I think, therefore, the decisions of the Supreme Court in West Australia in *Ex parte Willis*, and of REAL, J., in Queensland in *In re Small*, were erroneous, and that the decision of the Full Court, now under appeal, is right. I notice that one of the members of the last-mentioned Court was of opinion that this decision only

extends so far as the subordinate officers are concerned, and that the Governor-General, and not the Governor of Victoria, must sign the warrant for a fugitive's return. If the view I have stated is correct, the law of Victoria remains exactly the same as it was, and the power of the Governor of Victoria is exactly as it was before the establishment of the Commonwealth": 4 C.L.R., at pp. 278-280.

#### EXTRADITION ACT 1903.

This Commonwealth Act deals with extradition from the Commonwealth to foreign States, and from foreign States to the Commonwealth.

##### **Extradition from the Commonwealth.**

The Imperial Extradition Act 1870, section 18 provides that the King may by Order in Council direct that the law of a British possession, for carrying into effect the surrender of fugitive criminals in the possession, shall have effect in the possession, with or without modification, as if it were part of the Imperial Act.

The Commonwealth Act does what is necessary by providing that the functions vested by the Imperial Act in a Secretary of State are in the Commonwealth exercisable by the Governor-General or his deputy, and that the functions vested by the Imperial Act in a police magistrate or justice of the peace are in the Commonwealth exercisable by any stipendiary or police or special magistrate of the Commonwealth or a State, or any magistrate of a State specially authorized by the Governor-General.

The King has, by Order in Council, published in the Commonwealth *Gazette* of 17th July, 1904, directed that this Act shall have effect in the Commonwealth as if it were part of the Imperial Act; and the Governor-General has appointed the Governors of the several States or his deputies to exercise, in their respective States, his functions under the Act.

##### **Extradition from Foreign States.**

It is provided that requisitions to a foreign State, to which the Imperial Act applies, for the surrender of a criminal, may be made by the Commonwealth Attorney-General to a consular officer of that State in the Commonwealth, or to any Minister of that State through the British Ambassador in that State, or in such other mode as is settled by arrangement; and that a fugitive surrendered by a foreign State may be brought into the Commonwealth and

delivered to the proper authorities to be dealt with according to law. These provisions follow Canadian legislation : Rev. Stat. c. 142.

#### **HIGH COMMISSIONER ACT 1909.**

This Act created the position of the High Commissioner of the Commonwealth in the United Kingdom. The High Commissioner holds office, subject to the Act, for a period not exceeding five years from the date of appointment, and is eligible for re-appointment. He may at any time be removed from office by the Governor-General for misbehaviour or incapacity, or upon a joint address of both Houses of the Parliament. The salary of the High Commissioner is to be £3,000 a year, together with the expenses, not exceeding £2,000 a year, of an official residence, and such sums for travelling expenses as the Minister allows.

The Governor-General may, subject to the Commonwealth Public Service Act 1902, appoint officers for the performance of any duties required in the execution of the Act. The High Commissioner may make temporary appointments of officers, to last not longer than six months from the date of appointment, unless the Governor-General in the meantime confirms the appointment.

In December 1909, Sir GEORGE HOUSTOUN REID, P.C., G.C.M.G., was appointed the first High Commissioner.

**51. (xxx.)** The relations of the Commonwealth with the islands<sup>80</sup> of the Pacific:

#### **§ 80. "ISLANDS OF THE PACIFIC."**

##### **LEGISLATION.**

#### **PACIFIC ISLANDS LABOURERS ACT 1901-1906.**

By this Act no Pacific Island labourer was allowed to enter Australia on or after 31st March 1904 ; and before that date no Pacific Island labourer could enter Australia except under a licence. Any Pacific Island labourer who was not employed under an agreement of service made under the Queensland Pacific Island Labourers Act 1880-1892 was to be deported ; and no agreement was to be made or to remain in force after 31st December 1906. Provision was made for granting certificates of exemption to Pacific Islanders on the ground of long residence in Australia and certain other specified grounds.

**Deportation.**

The power conferred by the Pacific Island Labourers Act 1906, to deport kanakas not employed under an agreement, was upheld in *Robtelmes v. Brennan*, (1906) 4 C.L.R., 395. See note on "Naturalization and Aliens," *supra*, p. 486.

51. (XXXI.) The acquisition<sup>81</sup> of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws:

**§ 51. "ACQUISITION OF PROPERTY."****LEGISLATION.****LANDS ACQUISITION ACT 1906.**

This Act repeals the Property for Public Purposes Acquisition Act 1901, and re-enacts its provisions with modifications. It empowers the Commonwealth to acquire land for public purposes, from any State or person, by agreement with the owner or by compulsory process. For the purposes of acquisition by agreement, provision is made to enable title to be given by persons under disability or having a limited ownership. Compulsory acquisition is effected by a notification of acquisition made by the Governor-General in Council and published in the *Gazette*. The effect of the notification is to vest the estate of the owner, and in the case of Crown land the title of the State, in the Commonwealth, and to convert the rights of the owner into a claim for compensation. Provision is made for the assessment and payment of compensation to owners and encumbrancers, for the disposal by the Commonwealth of superfluous land.

**PATENTS ACT 1903-1909.**

By section 92 of this Act the Crown may use any invention in connection with the public service, on such terms as may be agreed to or settled by arbitration. The Governor-General may, if authorized by the resolution of both Houses, declare that a patent has been acquired by the Government of the Commonwealth. The Government is under an obligation to pay to a patentee such compensation as may be agreed to or settled by arbitration.

The Commonwealth has acquired private and State lands by the exercise of authority conferred in the following Acts :—

- Seat of Government Act 1908, section 6.
- Seat of Government Acceptance Act 1909, section 10.
- Kalgoorlie to Port Augusta Railway Act 1911-1912, section 19.
- Purchase Telephone Lines Acquisition Act 1911.
- Lighthouses Act 1911-1915, sections 5, 6.
- Defence Lands Purchase Act 1913.
- Commonwealth Railways Act 1917, section 63.

**State Stamp Tax on Federal Transfers.**

“ The acquisition of land includes obtaining a title to the land in accordance with the laws of the State. It follows that the conveyance by the vendor in the case of agreement, or the notification in the *Gazette* in other cases, is a necessary instrumentality for the acquisition of the land. It has been held that the taxation by a State of such an instrumentality falls within the rule laid down in *D'Emden v. Peddar*.” *Per* GRIFFITH, C.J. in *The Commonwealth v. New South Wales*, (1906) 3 C.L.R., at p. 814. See also, observations of BARTON and O'CONNOR, JJ., to the same effect, *ib.* at pp. 817, 822.

**The Nature of Commonwealth Title.**

Lands acquired by the Commonwealth under this Act, vest in the Commonwealth as a corporation, but the Act does not expressly define the nature of the title or interest or dominion in the land so vested. Several sections of the Act seem to indicate that an estate in fee simple is the greatest estate, title or interest so vested. Others would seem to imply that the Commonwealth acquired absolute sovereignty in the land so vested. There are sections in the Act which seem to indicate that upon the acquisition of Crown lands the Commonwealth acquires more than an estate in fee simple. Thus section 17 provides that the estate and interest of every person entitled to the land in the notification and the “ title of the State ” to any Crown lands specified in the notification, shall be taken to be converted into a claim for compensation. It could be argued that the title of state could in this connection be held to include the absolute ownership or sovereignty or political dominion of the land. The possibility of vesting in the Commonwealth the sovereignty and dominion of the land acquired by the Commonwealth is supported by the Constitution, section 52 (1) which provides that the

Commonwealth shall have exclusive legislative power with respect to the seat of Government of the Commonwealth and all places acquired by the Commonwealth for public purposes.

In the United States of America it has been held that when the Federal Government acquires legislative authority over land in any State such power carries with it exclusive jurisdiction and the land ceases wholly to be within the legislative power of a State ; that it ceases to be part of the State and that offences committed within the acquired territory can only be punished under and by the authority of Federal law : *Commonwealth v. Clary*, 3 -Mass., 721 ; *United States v. Cornell*, 2 Mason, 60 ; *Fort Leavenworth R.R. Co. v. Lowe*, 114 U.S., 525.

51. (xxxii.) The control of railways<sup>82</sup> with respect to transport for the naval and military purposes of the Commonwealth :

#### § 82. "CONTROL OF RAILWAYS."

##### LEGISLATION.

The Defence Act 1903-1912 contains provisions referable to this head. The Governor-General may, in time of war, authorize any officer to assume control of any railway for transport for naval or military purpose (section 64). State railways and tramways are required to carry troops and equipment as directed by the Governor-General or by regulation, and to provide all necessary engines and rolling stock (section 65) ; and to convey members of the Defence Force, on production of a pass signed by a commanding officer, for the purpose of attending musters, parades, and rifle practices, and returning therefrom (section 66). Reasonable compensation for the cost of these services may be provided for by regulation (section 124).

In the *Railway Employees' Case*, (1906) 3 C.L.R., at p. 545. the Chief Justice (Sir SAMUEL GRIFFITH), delivering the judgment of the Court, said :—

"The word 'control' as used in (xxxii.) cannot, we think, be limited to manual or physical control. It is the widest possible term, and at least co-extensive with the asserted general power to 'regulate.'"

In that case the Court relied strongly on the specific powers with regard to State railways, conferred by this and the two following sub-sections, as supporting the decision of the Court that, except to those specific provisions and the powers as to inter-state trade and commerce and preferential and discriminating rates given by sections 98 and 102, State railways were exempt, as instrumentalities of the State Governments, from Federal control.

51. (xxxiii.) The acquisition, with the consent of a State, of any railways of the State on terms arranged between the Commonwealth and the State :

51. (xxxiv.) Railway construction<sup>83</sup> and extension in any State with the consent of that State :

**§ 83. "RAILWAY CONSTRUCTION."**

LEGISLATION.

KALGOORLIE TO PORT AUGUSTA RAILWAY SURVEY ACT 1907.

KALGOORLIE TO PORT AUGUSTA RAILWAY ACT 1911-1912.

COMMONWEALTH RAILWAYS ACT 1917.

PINE CREEK TO KATHERINE RIVER RAILWAY ACT 1913.

PINE CREEK TO KATHERINE RIVER RAILWAY SURVEY ACT 1912.

The Kalgoorlie to Port Augusta Railway Act 1907 empowered the Minister, upon the formal consent of the South Australian Parliament to the survey being received, to cause a survey to be made of a route for a railway to connect Kalgoorlie, in the State of Western Australia, with Port Augusta, in the State of South Australia, and appropriated money for that purpose.

The South Australian Parliament, by the Northern Territory Surrender Act 1907, consented to the construction by the Commonwealth of the South Australian section of the railway ; and the Commonwealth Parliament, by the Kalgoorlie to Port Augusta Railway Act 1911-1912, empowered the Minister to construct the railway with a gauge of 4 feet 8½ inches, as soon as the West Aus-



tralian Parliament passed a consenting Act (which it forthwith did—see Transcontinental Railway Act 1911) and as soon as both States agreed to grant to the Commonwealth the lands necessary for the construction and working of the line. These conditions having been fulfilled, the construction of the line commenced from both ends in 1912 and the two ends were linked up on 17th October, 1917. The first passenger train went through Port Augusta on 22nd October 1917.

The extension of the Northern Territory Railway from Pine Creek to Katherine River, 54 miles, was completed during the year 1918.

51. (xxxv.) Conciliation<sup>84</sup> and arbitration<sup>85</sup> for the prevention<sup>86</sup> and settlement<sup>87</sup> of industrial<sup>88</sup> disputes<sup>89</sup> extending<sup>90</sup> beyond the limits of any one State :

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## LEGISLATION.

COMMONWEALTH CONCILIATION AND ARBITRATION (KINGSTON) ACT  
1904.

The chief objects of this Act were to prevent lock-outs and strikes in connection with certain industrial disputes ; to constitute a Commonwealth Court of Conciliation and Arbitration having jurisdiction for the prevention and settlement of industrial disputes extending beyond the limits of any one State. It provides for the creation of a Commonwealth Court of Conciliation and Arbitration, which shall be a Court of Record, and shall consist of a President to hold office during good behaviour for seven years and to be appointed by the Governor-General from among the Justices of the High Court. An industrial dispute is defined as a dispute in relation to industrial matters (a) arising between an employer or an organization of employers on the one part and an organization of employees on the other part, or (b) certified by the Registrar as proper in the public interest to be dealt with by the Court—and extending beyond the limits of any one State. It included disputes in relation to employment upon State railways, or to employment in industries carried on by or under the control of the Commonwealth or a State or any public authority constituted under the Commonwealth or a State : section 4 ; but it did not include a dispute relating to employment in any agricultural, viticultural, horticultural or dairying pursuit. Associations of employers who have employed on an average of not less than 100 workmen and associations of not less than 100 workmen could be registered in the office of the principal registry. By registration, such associations become incorporated organizations under the Act competent to bring complaints before the Court or to represent parties to the complaints.

The Court has power to hear and determine disputes in the manner prescribed ; to make orders or awards or give any directions in pursuance of the hearing. By its award the Court could prescribe a minimum rate of wages, and direct, that preference shall be, in certain cases, given to members of registered organizations, giving them special privileges in the conduct of proceedings before the Court. The Court could impose penalties for breach of its awards.

Any organization might make an industrial agreement with any other organization or with any person for the prevention and

settlement of industrial disputes existing or future, by conciliation and arbitration. Every industrial agreement had to be in writing. A duplicate of every industrial agreement had to be filed in the office of the Industrial Registrar, and of every organization affected thereby, within thirty days of the making thereof. Any organization or person bound by an industrial agreement was for breach or non-observance of any term of the agreement liable to a penalty.

**COMMONWEALTH CONCILIATION AND ARBITRATION ACT 1909.**

This Act amends in a number of minor details the Act of 1904.

**COMMONWEALTH CONCILIATION AND ARBITRATION ACT 1911.**

This Act enlarges the power of the Court ; abolishes conditions and limitations of preference to unionists and extends the principal Act to agricultural and other rural industries. It extends the definition of " industrial dispute " to include any " threatened, impending or probable dispute." " Industrial " was defined to include any business, calling, service, employment, handicraft or industrial occupation or avocation of employees on land or water.

By the original Act, section 31, it was provided that no award of the Court " shall be challenged, appealed against, reviewed, quashed or called in question in any other Court on any account whatever." By the amending Act of 1911, section 14, this section is altered by adding the words " or be subject to prohibition or mandamus."

**COMMONWEALTH CONCILIATION AND ARBITRATION ACT 1914.**

Provision was made for the appointment of a Deputy President to act in the Court in the absence of the President.

**COMMONWEALTH CONCILIATION AND ARBITRATION ACT (No. 2) 1914.**

When an alleged industrial dispute is submitted to the Court the complainant or respondent organization or association may apply to the High Court, for a decision on the question whether the dispute or any part thereof exists, or is threatened or impending or probable, as an industrial dispute extending beyond the limits of any one State or on any question of law arising in relation to the dispute or to the proceeding or to any award or order of the Court. The High Court shall have jurisdiction to hear and determine the question. The jurisdiction of the High Court under this section may be exercised by any Justice of the High Court sitting in Chambers. The decision of the Justice on the question shall be final

and conclusive, and shall not be subject to any appeal to the High Court in its appellate jurisdiction, and shall not be challenged, appealed against, reviewed, quashed, or called in question, or be subject to prohibition, mandamus or injunction, in any Court on any account whatever.

#### COMMONWEALTH CONCILIATION AND ARBITRATION ACT 1915.

Any association of not less than 100 employees engaged in any industrial pursuit whatever, together with such other persons, whether employees engaged in any industrial pursuit or pursuits or not, as have been appointed officers of the association and admitted as members thereof may be registered under the Act.

Every association registered before the commencement of this Act as an industrial organization or constituted under the principal Act is declared to be deemed validly constituted as from the date of such registration, and the registration shall be deemed to have constituted the association an organization under the Act in force at the date of such registration.

#### COMMONWEALTH CONCILIATION AND ARBITRATION ACT 1918.

The Governor-General is authorized to appoint any Justice of the High Court or Judge of the Supreme Court of a State to be the deputy of the President in any part of the Commonwealth, and in that capacity to exercise such powers and functions of the President as the Governor-General thinks fit to assign to the deputy. The deputy so appointed shall be entitled to hold office during good behaviour for the unexpired period of the term of office of the President for the time being and shall be eligible for re-appointment and shall not be removed during the said period except by the Governor-General on an address from both Houses of the Parliament in the same session, praying for such removal on the ground of proved misbehaviour or incapacity.

Section forty-four of the principal Act is amended by omitting sub-section (1) and inserting in its stead the following sub-section :—

“ Where any organization or person bound by an order or award has committed any breach or non-observance of any term of the order or award, a penalty not exceeding the maximum penalty fixed by the Court for any breach or non-observance of any term of the order or award ; or if no maximum penalty has been so fixed, the maximum penalty which the Court has power to fix therefor,

may be imposed by any District, County or Local Court or Court of summary jurisdiction which is constituted by a Judge or a Police, Stipendiary or Special Magistrate or by any State Court specified in that behalf by Proclamation."

Where a Court imposes a penalty in pursuance of the last preceding section, it may order that the penalty, or any part thereof, be paid into the Consolidated Revenue Fund, or to such organization or person as is specified in the order.

Section forty-eight of the principal Act is amended by omitting the words "The Court" and inserting in their stead the words "A County, District or Local Court."

Special provision is made for the employment of returned soldiers and sailors as follows:—Nothing in any award or order made under this Act, or in any agreement relating to industrial matters shall operate to prevent the employment of returned soldiers or sailors. For the purpose of this section "returned soldiers" means persons who, during the war which commenced in the year 1914, served abroad as members of any military force raised in Australia, or prior to that war resided in Australia, and during that war served abroad as members of a military force raised in any other part of the British Dominions. "Returned sailors" means persons who, during the war which commenced in the year 1914, served abroad as members of any naval force raised in Australia, or prior to that war resided in Australia, and during that war served abroad as members of a naval force raised in any other part of the British Dominion.

### **Scope of Industrial Power.**

Almost every word in section 51 (xxxv.) containing this grant of power has been the subject of legal contest and judicial interpretation. The words "conciliation," "arbitration," "prevention," "settlement," "industrial disputes," "extending beyond the limits of any one State" have been the subjects of prolonged and minute inquiry and considered decisions. By far the most momentous judgments given by the High Court were those in which it was held:—(1) That the Commonwealth Court of Conciliation and Arbitration could not make an award regulating the conditions of employment upon State railways; (2) That an award making a common rule was in excess of jurisdiction and was therefore null and void;

and (3) That an award inconsistent with the determination of a State wages board was similarly null and void for the same reason. With these exceptions the decisions of the Court have been in favour of the widest construction of the Federal industrial power.

The parties to these legal contests have been on the one hand organizations representing workers claiming redress of grievances, and on the other hand organized employers of labour resisting what they considered to be unreasonable demands. The claims originated in the Commonwealth Court of Conciliation and Arbitration created by the Federal Parliament in the exercise of power conferred by this section. From that arena many cases involving legal and constitutional issues found their way into the High Court either in the form of questions stated by the President for the opinion of that Court or on applications for writs of prohibition to restrain the enforcement of awards objected to.

The supporters of the awards generally argued in favour of an enlarged interpretation of Federal powers, in order to bring the awards within the powers; whilst the opponents of awards for the most part sought to limit the Federal powers and keep them within the strictest bounds, in order to prevent any encroachment upon matters belonging to the internal domestic affairs and exclusive authority of the States.

### **Questions Arising under Arbitration Law.**

Among the issues raised and settled by the High Court, not always with unanimity, were such questions as the following:—

(1) The validity of the organization and machinery provisions of the Conciliation and Arbitration Act.

(2) Whether the Constitution, section 51 (xxxv.) contemplates voluntary or compulsory arbitration?

(3) The meaning of "industrial"; does it cover all labour and employment?

(4) The meaning of "dispute," its nature, essential elements, requisites and conditions?

(5) Whether "preconcert" on the part of employees in making demands and "preconcert" on the part of employers in refusing such demands are essential factors of a dispute?

(6) Is a simple demand and refusal sufficient to create a dispute?

(7) Whether dissatisfaction and discontent antecedent to a demand communicated to employers are essential elements of a dispute?

(8) Has the Court jurisdiction in the case of a threatened, impending or probable dispute or is it limited to a real and existing dispute between defined and ascertained parties ?

(9) The functions of "conciliation" as distinguished from "arbitration."

(10) The difference between "prevention" and "settlement" of disputes.

(11) Is arbitration a judicial proceeding or does it mean legislation by the arbitrator ?

(12) Can the Court make "a common rule" or regulation applicable to and binding on persons not parties to a dispute ?

(13) Is the arbitrator limited to the claim and matters raised in the plaint or can he direct altered conditions of employment not asked for by the parties ?

(14) Can there be a claim for different rates of pay varying in different States and, where such a differentiation is claimed, can there be a dispute extending beyond the limits of any one State ?

(15) Can the Court make an award inconsistent with a written contract between the parties or inconsistent with a State industrial agreement or a State industrial award or the determination of a State Wages Board ?

(16) Can the Court make an award binding ship-owners and persons employed on board ships, trading between Australia and the South Seas ?

(17) Can the Court order an employer to permit an employee to wear a union badge whilst on duty ? Can it grant preference to unionists ?

(18) Can the High Court restrain by writ of prohibition the Conciliation and Arbitration Court if it seeks to enforce an award not authorized by the Constitution ?

### **High Court Review of Industrial Cases.**

The judicial powers of the President of the Court of Conciliation and Arbitration under the Act is very great and his decisions on questions of fact are final and conclusive and cannot be reviewed. There are, however, two methods of procedure by which questions of law, arising under the Act, may reach the High Court ; one is by a special case stated by the President for the opinion of the High Court and the other is by writ of prohibition issued out of the High Court for the purpose of correcting the President where he has made an award without jurisdiction or contrary to a proper interpretation of the Constitution.



The power of the High Court to interpose by writ of prohibition where a Commonwealth Court is proceeding without jurisdiction, is given direct by the Constitution, as original jurisdiction of the High Court, and there being no authority in Parliament to annul that authority, any attempt to do so necessarily fails. Therefore, the provisions of section 31 (1.) of the Commonwealth Conciliation and Arbitration Act 1904-1911 which purports to take away from the High Court the power to issue prohibition in respect of an award or order of the Commonwealth Court of Conciliation and Arbitration is unconstitutional and void: *The King v. The Commonwealth Court of Conciliation and Arbitration*; *Ex parte Whybrow & Co.*, 11 C.L.R., 1; upon that point affirmed. *The King v. The Commonwealth Court of Conciliation and Arbitration*; *Ex parte Brisbane and Adelaide Tramway Trusts*, 18 C.L.R., at p. 54.

In the early history of the Conciliation and Arbitration Court, considerable time was taken up and delay in settling disputes occurred in the hearing of special cases and applications for prohibitions for the purposes of determining jurisdictional questions such as, *e.g.*, Is there evidence to prove the existence of an industrial dispute within the meaning of the Act? or does the dispute extend beyond the limits of any one State? Very often these questions were raised after long and protracted enquiries involving great expense.

In 1914 an amending Act was passed enabling a complainant or respondent organization at the initiation of a complaint to immediately apply to a single justice of the High Court sitting in Chambers to decide in a summary manner whether there is an industrial dispute extending beyond the limits of any one State. The decision of the Justice on the question submitted is made final and conclusive and without appeal. The validity of this Act was affirmed by the High Court in the case of *The Federated Engine-Drivers' and Firemen's Association v. Colonial Sugar Refining Co. Ltd.*, (1916) 22 C.L.R., 103.

### **Representative Organizations.**

The provisions of the Commonwealth Conciliation and Arbitration Act (1904) in respect of the registration of associations, as organizations, particularly in so far as they permit the registration of an association of employers or employees in an industry in one State only, and provide for the incorporation of organizations when registered, are valid, as incidental to the "conciliation and arbitration" power: *The Jumbunna Coal Mine No Liability v. Victorian Coal Miners' Association* (1908) 6 C.L.R., at p. 309.

The application of the "principle of collective bargaining" not long in use at the time of the passing of the Constitution, is essential to bind the body of workers in a trade and to ensure anything like permanence in the settlement. Some system was therefore essential by which the powers of the Act could be made to operate on representatives of workmen, and on bodies of workmen instead of on individuals only, but if such representatives were merely chosen for the occasion without any permanent status before the Court it is difficult to see how the permanency of any settlement of a dispute could be assured. Even when the dispute is at the stage when it may be prevented or settled by conciliation, some representative body must have the right to bind and the power to persuade not only the individuals with whom the dispute has arisen but the ever changing body of workmen that constitute the trade : *Per O'CONNOR, J.*, 6 C.L.R., at p. 358.

#### **Arbitration Inapplicable to State Railways.**

One of the earliest and most important decisions given by the High Court on the interpretation of the constitutional power conferred by section 51 (xxxv.) was the case in which it held that the arbitration power did not extend to the settlement of labour questions in State railways. In the year 1906, the New South Wales Railway Traffic Employees Association, an association of employees on the State railways of New South Wales, applied to the registrar of the Commonwealth Court of Conciliation and Arbitration to be registered as an organization under the Commonwealth Conciliation and Arbitration Act 1904. The application was opposed by the Federated Amalgamated Government Railway and Tramway Service Association, but was granted by the Registrar. From his decision the Federated Amalgamated Government Railway and Tramway Service Association appealed to the President of the Commonwealth Court of Conciliation and Arbitration. One of the grounds of appeal was that the applicant association, being an association of State railway servants, could not be registered under the Act, and that the Act in so far as it purported to include State railway servants within its provisions, was *ultra vires* and void. The President, treating this objection as a question of law, pursuant to section 31 (2) of the Act, stated a case for the opinion of the High Court, setting out these facts.

The High Court in an exhaustive judgment, delivered by the Chief Justice, established the following propositions :—(1) That the

rule, laid down in *D'Emden v. Pedder*, 1 C.L.R., at p. 111, viz., that when a State attempts to give to its legislative or executive authority an operation, which, if valid, would fetter, control, or interfere with the free exercise of the legislative or executive power of the Commonwealth, the attempt, unless expressly authorized by the Constitution, is to that extent invalid and inoperative, is reciprocal. It is equally true of attempted interference by the Commonwealth with State instrumentalities. The application of the rule is not limited to taxation. Section 51 (xxxv.) of the Constitution does not either expressly or by necessary implication authorize such an attempt. A State railway is a State instrumentality within that rule. The legislative authority of the Commonwealth Parliament under the powers contained in sections 51 (I.) and 98 of the Constitution, so far as regards wages and terms of engagement, does not extend further than to prohibit, for causes affecting inter-State traffic, specific persons from being employed in such traffic. That when in the attempted exercise of a power of limited extent an Act is passed which in its terms extends beyond the prescribed limits, the whole Act is invalid, unless the invalid part is plainly severable from the valid.

It was held, therefore, that the Commonwealth Conciliation and Arbitration Act 1904, so far as it purports to affect State railways, is *ultra vires* and void, and, consequently, that an organization consisting solely of employees on State railways was not entitled to be registered under that Act: *The Federated Amalgamated Government Railway Service Association (appellants) v. The New South Wales Railway Traffic Employees' Association (respondents)*, (1906) 4 C.L.R., 488.

#### **Inapplicable to State Water Supply Authorities and Wheat Board.**

The Board of Water Supply and Sewerage, of Sydney, like the State railway service, is in the strictest sense a department of the State Government. The receipts go into the Consolidated Revenue and its disbursements are defrayed out of that fund. It has been held, therefore, that this Board is exempt from the jurisdiction of the Commonwealth Arbitration Court: *Federated Engine-Drivers' and Firemen's Association of Australia v. Broken Hill Proprietary Co. Ltd.*, (1911) 12 C.L.R., 398; (1913) 16 C.L.R., 245.

Commonwealth awards are inapplicable to State Government Wheat Handling Boards: *Australian Workers' Union v. New South Wales, Victoria and Others, The Argus*, 13th June, 1919.

**Municipal Bodies, when bound.**

On the other hand the Court has held that the Melbourne City Council or any municipal corporation so far as it engages in what is called "municipal trading," such as supplying electric light and power to the public, thereby joins the ranks of employers in the Commonwealth industries and it is liable to the same Federal laws as any other employer engaged in the same industries and cannot claim immunity from Federal powers on the ground of being a Government department : 12 C.L.R., 398 ; (1913) 16 C.L.R., 245.

The rule of *D'Emden v Pedder* relating to State instrumentalities was exhaustively argued before the full Bench of the High Court in November and December 1918, in the cases :—

- (1) *Federated Municipal and Shire Council Employees' Association v The Lord Mayor, Aldermen, Councillors and Citizens of the City of Melbourne and Others.*
- (2) *The Federated Seamen's Union of Australasia v The Commonwealth S S Owners' Association and Others (as to the Marine Board, Launceston).*

After several days hearing the Court reserved judgment. From the general trend of the case it was probable that the rule exempting municipalities and other State instrumentalities from Federal control would be very considerably curtailed. This expectation was realized when the decision was given holding that municipal employees are not necessarily exempt from Commonwealth awards : *The Municipalities' Case*, *The Argus*, 20th May, 1919.

**§ 84. "CONCILIATION."**

**Mode of Conducting.**

The power of the Commonwealth Parliament does not extend to general legislation for the prevention of industrial disputes but only to conciliation and arbitration for that end. Conciliation means conciliation for the prevention of threatened disputes and for the settlement of actual disputes. Conciliation may possibly prevent a dispute and it may settle one. The aim of conciliation is to bring about a voluntary agreement of the parties. Industrial agreements

are authorized by the Act as a means of conciliation and as such are valid. Such agreements are conducive to preventing industrial disputes from arising, and would, in that indirect way, conduce to preventing them from extending beyond the limits of any one State. If this be so, and if the power to authorize such agreements had been conferred on the Parliament, it might be argued that industrial agreements between purely intra-state organizations would be justifiable as having a preventive tendency : *Jumbunna Coal Mine Case*, 6 C.L.R., at p. 339.

### **What it Connotes.**

The President may, whenever in his opinion it is desirable for the purposes of preventing or settling an industrial dispute, summon any person or persons to attend at a time and place specified in the summons at a conference to be presided over by himself. The conference may be held partly or wholly in public or in private at the discretion of the President. By section 16 the President is charged with the duty of endeavouring at all times, by all lawful ways and means to reconcile the parties to industrial disputes and to prevent and settle industrial disputes whether or not the Court has cognizance of them, in all cases of which it appears to him that his mediation is desirable in the public interest. If the dispute is not settled at such conferences the President is authorized to refer the matter to the Court.

Conciliation within the Act means mediation and reconciliation by and through some Court or tribunal committee or person or persons recognized by the law or by the parties, acting not as one of the disputants but as a mediator ; who may avert the necessity of a formal reference to some compulsory tribunal by inducing the parties to come to some amicable agreement. An amicable agreement so made could come under the head of " industrial agreement." Conciliation has a special meaning which it had in the year 1900 (when the Constitution of the Commonwealth became law) in relation to industrial disputes, namely, some authority in the nature of a tribunal or mediator. *Per O'CONNOR, J.* in the *Jumbunna Coal Mine Case*, 6 C.L.R., at p. 366.

According to the *Oxford Dictionary*, conciliation, in the sense of the Act, means mediation by some affirmed court, tribunal or person for composing disputes by conferring with the parties :

a voluntary settlement, the case proceeding to a judicial Court if this is not accepted. The quotation from the *Oxford Dictionary* is evidence that the statement is ordinarily understood to include some voluntary arrangement of differences and therefore it is naturally referable to the conciliation within section 51, sub-section xxxv. of the Constitution. Steps may be taken in the direction of and for the purposes of conciliation or even for arbitration before an industrial dispute is developed and before the persons concerned in the industry have taken definite stands or made definite claims. No one who is at all familiar with the genesis of great industrial disputes can be ignorant of the general uneasiness, unrest, the individual grumbling, the dissatisfaction, often indefinite, which precede an ultimate quarrel; and to this end, before matters have come to a head, the power of conciliation or arbitration for prevention seems to be directly applicable (so far as the Constitution is concerned). *Per* HIGGINS, J. in the *Australian Boot Trade Employers' Federation v. Whybrow & Co.*, (1910) 11 C.L.R., at p. 340.

In several cases the majority of the Court has tacitly, if not expressly, distributed these terms by taking "conciliation" to be applicable to the "settlement" as well as the "prevention" of industrial disputes, and "arbitration," on the other hand as applicable to their "settlement" alone. *Per* BARTON, J. in *Ex parte Whybrow (Prohibition Case)*, (1910) 11 C.L.R., 320.

In the nature of things an industrial dispute may be prevented from coming into existence by various means, but the only means which the Parliament is authorized to employ are conciliation and, perhaps, arbitration. *Per* GRIFFITH, C.J., in *Ex parte Whybrow (Prohibition Case)*, (1910) 11 C.L.R., 319.

### **Industrial Agreement.**

By the Conciliation and Arbitration Act (1904), section 73, it is provided that any organization may make an industrial agreement with any other organization or with any person for the prevention and settlement of industrial disputes existing or future by conciliation and arbitration.

In June 1911, the Musicians' Union of Australia, an organization registered under the Act entered into an agreement with J. C. Williamson & Co. Ltd. which purported to be an industrial agreement under the Act. The Union having secured certain terms and condi-

tions of employment, bound themselves not to make any further request or demand on the Company in relation to industrial matters within the Commonwealth during the continuance of the agreement—a space of three years. In 1912, the members of the union threatened, and took steps to commence, proceedings in the Commonwealth Court of Conciliation and Arbitration, in breach of their undertaking, and the plaintiff company brought an action in the High Court to have them restrained by injunction from committing such breach.

The defendant organization contended that the High Court had no jurisdiction to restrain the said organization by injunction from instituting proceedings in respect of industrial matters in the Commonwealth Court of Conciliation and Arbitration, even though the institution of the said proceedings is in violation of the said industrial agreement.

The main question was one involving the legal construction of section 73. It was argued for the defendant that the agreement in this case was not an industrial agreement within the meaning of the section, as it was not arrived at by or in contemplation of conciliation and arbitration.

In the *Jumbunna Case*, 6 C.L.R., at p. 346, Mr. Justice BARTON expressed an opinion that section 73 was the governing provision of part VI., and his remarks certainly tended to the opinion that the industrial agreement to which the Act gave certain force and attributes was an agreement for the prevention and settlement of an industrial dispute by conciliation and arbitration, and that the remaining sections of the part were ancillary to section 73. The point, however, was not fully considered or finally settled in that case. It re-appeared in a concrete form in the *Musicians' Case* in which the agreement, dealt very extensively with the terms and conditions of employment, but did not purport to provide for the prevention of industrial disputes by conciliation or by arbitration.

It was held by the majority of the Court that even if the observance of section 73 was a condition precedent to its validity as an industrial agreement under the Act its non-observance did not prevent it from being a valid and subsisting agreement at common law and there was no legal obstacle to its being effective and binding in that way. If it did not come under the Act as an industrial agreement, it had all the requisites of a good agreement at common law

and its violation could be restrained by injunction. *Per* GRIFFITH, C.J. and BARTON, J. (ISAACS, J. dissenting) in *J. C Williamson & Co. Ltd. v. The Musicians' Union of Australia*, (1912) 15 C.L.R., at p. 636.

### **Industrial Agreement when a bar to Jurisdiction of Arbitration Court.**

At the final stage of the *Federated Engine-Drivers' and Firemen's Association of Australasia v. Broken Hill Proprietary Co. Ltd. and others* (No. 3), the respondent put in an agreement headed "industrial agreement" between the claimant and the Northern Collieries. The agreement purported to settle wages and conditions of employment which should apply to members of the organization who were then or might thereafter during its currency be working for the employer. It contained a provision for the reference to the Industrial Registrar of any dispute arising under the agreement. This agreement had been filed in the office of the Registrar but no memorandum of its terms had been submitted to the President for a certificate under section 24 of the Act. The question was then raised whether these agreements barred the jurisdiction of the Court to make awards. It was argued for the claimants that they were not industrial agreements within part VI. of the Act as they were not agreements for the settlement of industrial disputes by conciliation and arbitration as required by section 73 of the Act. These views were sustained by the High Court: *The Federated Engine-Drivers' and Firemen's Association v. The Broken Hill Proprietary Co. Ltd.* (No. 3), (1913) 16 C.L.R., 716.

In the opinion of Mr. Justice HIGGINS, section 73 is designed to enable parties to provide for a method of conciliation and arbitration other than that of the Court. Part VI. of the Act provides another means of conciliation and arbitration which stands quite apart from the remaining provisions of the Act. *Per* HIGGINS, J., 16 C.L.R., at p. 730.

In the *Australian Agricultural Co. v. The Federated Engine-Drivers' and Firemen's Association*, (1913) 17 C.L.R., 261, an action was brought by the Australian Agricultural Co. and a number of individuals and other companies against the Federated Engine-Drivers' and Firemen's Association of Australasia and by the writ the plaintiffs claimed an injunction restraining the defendants from proceeding against the plaintiffs with a certain plaint in the Commonwealth Court of Conciliation and Arbitration filed by the defendants



against the plaintiffs and others in violation of the terms of certain agreements between the plaintiffs and the defendants dated 13th November 1910 and 3rd, 5th and 18th of May 1911.

It was held by the whole Court (BARTON, A.C.J., ISAACS, HIGGINS, GAVAN DUFFY, POWERS and RICH, JJ.) that such an agreement was not operative at all, if it is not, in fact, such an industrial agreement or if it is incapable of being certified and filed under section 24; therefore the High Court will not interfere by injunction to restrain such an organization from including the employer in proceedings in the Commonwealth Court of Conciliation and Arbitration in respect of that dispute.

It was stated *per* ISAACS, HIGGINS, GAVAN DUFFY and RICH, JJ. (BARTON, A.C.J. and POWERS, J. dissenting), that *J. C. Williamson Ltd. v. Musicians' Union of Australia*, 15 C.L.R., 636, was wrongly decided and must be over-ruled. They held that an agreement purporting to prevent the parties to it or either of them from instituting proceedings in the Commonwealth Court of Conciliation and Arbitration is contrary to public policy, and therefore void: *The Australian Agricultural Co. v. Federated Engine-Drivers' and Firemen's Association of Australasia*, (1913) 17 C.L.R., at p. 261.

### § 85. "ARBITRATION."

#### **Arbitration distinguished from Legislation.**

The power to legislate with respect to arbitration for the settlement of a dispute necessarily involves power to make provision for constituting an arbitral tribunal, for bringing before it the parties to the dispute, and for enforcing the award of the tribunal, in the exercise of this power, and to attain these ends, the Parliament is unfettered in its choice of means, provided that they are really incidental to the attainment of these ends, and not manifestly unconnected with them. *Per* GRIFFITH, C.J. in the *Jumbunna Coal Mine Co. v. Victorian Coal Miners' Association*, (1908) 6 C.L.R., at p. 333.

#### **State Wages Boards.**

In settling a dispute the Federal Arbitration Court can make an award which may involve the abrogation of the existing contractual rights of either of the parties where the abrogation is necessary for the effective settlement of the industrial dispute. The Court may make an award in disregard of a contract between employer and

employee and in disregard of the State law which makes such contract binding. It may make an award in disregard of and inconsistent with an award made by a State Arbitration Court in a State industrial dispute. The State award yields to the supremacy of a Federal award. But the Federal Arbitration Court, having judicial but not legislative power, cannot make an award containing terms and conditions of labour inconsistent with the provisions of a State Statute relating to labour or inconsistent with the determinations of a subordinate State legislative body, such as a State Wages Board constituted by a State Statute and empowered to make such determinations in advance of and independently of any dispute. *Per GRIFFITH, C.J. and O'CONNOR, J. in The Federated Saw Mill Case, (1909) 8 C.L.R., at pp. 511-512.*

### Domestic Trade and Industry of a State.

The doctrine has been repeatedly laid down by the High Court that any invasion by the Commonwealth of the sphere of the domestic concerns of the States, appertaining to trade, commerce, police and industry, is forbidden except so far as the invasion is authorized by some power conferred in express terms or by necessary implication. The cases also establish that the regulation of the conditions of employment is within that sphere. Yet in the *Federated Saw Mill Case*, 8 C.L.R., 493, it was gravely maintained that the tribunal which the Federal Parliament may establish for the settlement of industrial disputes is not bound by any State laws relating to domestic trade and industry and that, although the Parliament itself could not make a law inconsistent with the State law, it could, under the language of section 51, sub-section (xxxv.) authorize its creature, the tribunal of arbitration, to disregard the State law, to free persons from any obligation to obey it, and even impose penalty upon persons who do obey it, because such power is necessary for the effective settlement of industrial disputes.

Referring to this contention the Chief Justice (Sir SAMUEL GRIFFITH) said :—" I find it difficult to treat such an argument with due gravity. Discontent with the State law cannot be described as a dispute in any sense in which that word has hitherto been used, so that a power to authorize the settlement of disputes cannot be read as a power to set aside or suspend or abrogate an obnoxious law. But, even if it could, it seems to me that, applying the rules of construction of the Constitution so often laid down, at best the language would be ambiguous, and that, even if the words are capable

of the meaning asserted, it is so inconsistent with the reservation to the States of the power to regulate their domestic trade that it should be rejected. For, if conceded, it practically annuls that reservation, and permits the Federal tribunal to substitute its uncontrolled volition for the will of the Parliaments of the States, so soon as a political agitation for the repeal of an abnoxious law in any State is taken up by sympathizers in another State." *Per* GRIFFITH, C.J. in the *Federated Saw Mill Case*, (1909) 8 C.L.R., at p. 493.

### **State and Federal Industrial Spheres.**

The Constitution leaves to each State the exclusive control over all phases of industry operating solely within State limits. The State may make laws imposing any rights, duties, or obligations it deems fit on employers and employees engaged in its industries. That power is as definitely vested in the State as the power conferred by sub-section xxxv. is vested in the Commonwealth. It is in accordance with the principles laid down by the High Court on many occasions that these two powers, that of the State to control its own industrial affairs, and that of the Commonwealth to empower its Courts to settle by arbitration industrial disputes extending beyond the limits of any one State, must be so construed as to be as little as possible inconsistent with each other. *Per* O'CONNOR, J. in the *Federated Saw Mill Case*, (1909) 8 C.L.R., 510.

The Justices who dissented from this decision, ISAACS and HIGGINS, JJ., were of opinion that there are no words in the Constitution which expressly or by necessary implication exclude from the Federal Statute which it has authorized, in expressed terms, any interference with the rules of conduct prescribed by a State act: that the doctrine of implied prohibition based on the case of the *United States v. Dewitt* has been but faintly sustained and will not apply to the Australian Constitution; that Federal powers cannot be defeated by State powers much less by State acts, otherwise all Federal powers would be subject to the possibility of State acts; that the Federal Parliament can validly empower industrial arbitration which, in the opinion of the arbitrator, would effect a settlement on just and equitable terms even though all the States acting together choose to pass statutes to the contrary; that the Federal Court is not bound by State laws or by State Arbitration Court awards or by the determination of State Wages Boards; that by the force of the covering clause V. of the Constitution the award of a Federal

Arbitration Court in a case within its jurisdiction was just as much a determination in the nature of a law as the determination of a State Wages Board. *Per* Justices ISAACS and HIGGINS in *The Federated Saw Mill Case*, 8 C.L.R., at pp. 537-547.

On account of illness Mr. Justice BARTON was not able to sit in *The Federated Saw Mills Case*, which was heard by four Judges who were equally divided in opinion on the main question at issue. The opinions expressed, fully as they were, seemed not to have been absolutely decisive in judgment by reason of the manner in which the question came before the Court. The same question was re-argued in *The Australian Boot Trade Employees' Federation v. Whybrow & Co.*, (1910) 10 C.L.R., 267.

The majority of the Court as then constituted (GRIFFITH, C.J. and Justices BARTON and O'CONNOR) held that the Commonwealth Court of Conciliation and Arbitration has no jurisdiction under section 51 (xxxv.) of the Constitution to make an award inconsistent with the State law. The determination of a wages board empowered by a State statute to fix a minimum rate of wages might be such a law. Whether it is or not depends upon the terms of the statute under which it is made. An award is not inconsistent with State law if compliance with the award is consistent with obedience to the State law. Held, therefore, that an award fixing a minimum rate of wages higher than that fixed by a determination of a State Wages Board is not for that reason alone inconsistent with that determination. So held by GRIFFITH, C.J., and BARTON and O'CONNOR, JJ. (ISAACS and HIGGINS, JJ. dissenting). Opinion to that effect in *Federated Saw Mill &c. Employees of Australasia v. James Moore & Sons Proprietary Ltd.*, 8 C.L.R., 465, adopted.

The term "arbitration" connotes a judicial tribunal, by whatever name it is called and however constituted. Although the functions of that tribunal differ from those of ordinary tribunals in that they are not limited to determining existing causes of action, but extend to prescribing conditions to be observed in future contracts of employment, the tribunal is no less a judicial tribunal. The obligation to decide in accordance with law is implied in the notion of the creation of a tribunal; otherwise the members of the tribunal would not be judicial persons at all, but dictators exercising the power of legislation, not of adjudication. *Per* GRIFFITH, C.J.

in the *Federated Saw Mill Employees of Australasia v. James Moore & Sons Proprietary Ltd.*, 8 C.L.R., at pp. 492-493.

“ Primarily ” said the Chief Justice, “ arbitration means determination by a tribunal which is not an ordinary Court of justice bound to administer a strict rule of the common and statute law, but a tribunal selected by the parties to the controversy, to which both submit themselves and by whose determination they agree to be bound. The efficacy of the award is derived from the agreement of submission, although statutory provisions for its enforcement are now commonly adopted. The foundation of the authority of the arbitrators is the consensual agreement of the parties. In the Commonwealth Conciliation and Arbitration Act the Parliament has thought fit to provide for the appointment of a single judge of very large powers, and to call his Court a Court of Arbitration. Courts of law are not concerned with the propriety or accuracy of such a designation. But it is clear that the nature or authority of the tribunal authorized by the Constitution cannot be altered by giving it a particular name or prescribing a particular mode of appointment. If the Parliament had thought fit to prescribe that the tribunal of arbitration should be selected in part or wholly by the parties to the dispute, the authority of the tribunal would have been neither greater or less on that account than that of the single arbiter.” *Per* GRIFFITH, C.J. in *The Australian Boot Trade Employees' Federation v. Whybrow & Co.*, (1909) 10 C.L.R., at pp. 281-283.

“ An industrial dispute ” said Mr. Justice O'CONNOR, “ in its nature involves a complaint against the operation of existing rights under existing conditions. The aim of the tribunal charged with its settlement is the establishment of a *modus vivendi* for the future, which in many cases can be achieved only by the modification of existing contracts and the creation of new rights and obligations between the parties. It would be a contradiction in terms to confer the power to settle industrial disputes upon a tribunal powerless to do more than give effect to existing contracts and enforce existing rights. There must therefore be implied, from the very nature of the subject-matter, power in the Parliament to confer on the Federal Arbitration Court authority to enter upon the settlement of an industrial dispute unfettered by any obligation to preserve rights under existing contracts of employment between the parties or to give effect to the laws of the State, statutory or otherwise, by which

those rights are recognized and enforced. For a similar reason it must be taken that power is implied to clothe the arbitral tribunal with authority to disregard the award of a State Industrial Arbitration Court which stands in the way of an effective settlement of an industrial dispute within the purview of the Federal power. Rights conferred by contract entered into between the parties and rights created by award of a State industrial tribunal in settlement of an industrial dispute between them must stand in this respect on the same footing. . . . Save in that respect Parliament is not empowered to vest in the Federal tribunal any more authority to disregard State laws than an ordinary arbitral tribunal would have. . . . Where, however, a State statute directs the doing or prohibits the doing of something the parties cannot relieve themselves from obedience to its provisions; it follows that in such a case arbitrators could not, by their award, relieve the parties from the obligation to do the thing directed or to refrain from doing the thing prohibited." *Per O'CONNOR, J. in The Australian Boot Trade Employees' Federation v. Whybrow and others*, 10 C.L.R., at pp. 300-304.

It might be worth while to refer to the attempt of the Victorian Parliament to oust the jurisdiction of the Federal Court to deal with cases where a State wages board has made a determination.

This was attempted by the Victorian Factories and Shops Act 1909 (No 2), section 39. It will be found discussed in the *Boot Trade Case*, 10 C.L.R., at p. 300.

Mr. Justice ISAACS and Mr. Justice HIGGINS dissented altogether from the view that an award of a Federal Court of industrial arbitration is judicial in its nature, and therefore cannot over-ride the laws of a State. They considered that an award of the Commonwealth Arbitration Court became a law of the Commonwealth and that by virtue of covering clause V. of the Constitution, it is binding on all Courts and Judges to the exclusion of State awards or the determination of State Wages Boards: 10 C.L.R., at pp. 313, 331.

### **Invalidity of Common Rule.**

The provision of the Commonwealth Conciliation and Arbitration Act 1904-1910 which purport to authorize the Court of Arbitration to declare a common rule of wages and conditions of labour, in any particular industry, and to direct that the common rule, so

declared, shall be binding on persons engaged in that industry without such persons being made parties to a plaint, properly brought before the Court, attempts to give the Court legislative rather than judicial power and it has been held to be *ultra vires* the Parliament and invalid. So held finally in *The Australian Boot Trade Employees' Federation v. Whybrow & Co.*, 11 C.L.R., 311.

### Validity of Compulsory Arbitration.

In *The King v. The Commonwealth Court of Conciliation and Arbitration*; *Ex parte Whybrow and others*, (1910) 11 C.L.R., at p. 1, an application was made to the High Court for a prohibition to restrain the enforcement of an award on the ground principally that the Commonwealth Conciliation and Arbitration Act as a whole was *ultra vires* the Constitution. It was argued that "arbitration" connoted a voluntary submission, and a submission to a tribunal selected or appointed directly or indirectly, by the parties to the dispute; and that the functions of the tribunal are limited to those which the parties could, by agreement, have vested in it and cannot for instance, make orders binding on third parties. The High Court, however, held that the Act was not *ultra vires* either on the ground that reference of disputes was compulsory or on the ground that the tribunal was not chosen by the disputants. As regards the functions of the tribunal, they held that the only arbitral power which could be conferred on the Court of Arbitration was the power of judicial determination between the parties to a dispute.

### § 86. "PREVENTION."

#### Construction.

In several cases coming before the High Court the question has been raised and discussed whether the "preventive" power given by the Constitution is limited to conciliation or whether and if so, how far it extends to arbitration. But it has not yet been definitely settled that the words "prevention and settlement" should be grammatically distributed so as to apply "prevention" to conciliation only, and "settlement" to arbitration only; such a construction would exclude settlement by conciliation. Doubt has, however, been expressed as to the possibility of there being arbitration with respect to a dispute which has not assumed a concrete form of existence.

In the *Jumbunna Coal Mine v. The Victorian Coal Miners' Association*, (1908) 6 C.L.R., at p. 332, the Chief Justice (Sir SAMUEL

GRIFFITH) said that the power for the prevention of a dispute was confined to conciliation for that purpose, and therefore it did not extend to "collective bargaining" except so far as collective bargaining might be incidental to such conciliation or arbitration for the settlement of an existing dispute.

Mr. Justice BARTON said conciliation might possibly prevent a dispute; as to that he said nothing, and, he added, "We know it may settle a dispute but I do not see how there could be an arbitration, unless there is a dispute, calling for settlement, already in existence": *ib.*, p. 341.

In the *Australian Boot Trade Employees' Federation v. Whybrow and others*, (1910) 11 C.L.R., 311, counsel for the claimants attempted to justify the common rule provision on the grounds that it was incidental to the prevention of disputes by arbitration. To this argument the objectors (employers) answered that the expression "arbitration for the prevention of a dispute" is a contradiction in terms, since the word "prevention" connotes an event which has not yet happened, whilst the word "arbitration" connotes the presence of parties to an existing dispute; so that, it was said, subsection xxxv. must be read distributively, as meaning "conciliation for the prevention of disputes and arbitration for the settlement of disputes." Referring to this argument the Chief Justice (Sir SAMUEL GRIFFITH) said:—"I am disposed to think that from a strict etymological point of view, this may be the more accurate construction, but I am not sure that that consideration is conclusive. Conciliation is not now in question, but the words 'dispute' and 'prevention' are both susceptible of different shades of meanings, according to the point of view from which the particular state of facts is regarded. The same facts may in one aspect be regarded as showing a difference of opinion likely, if not composed, to develop into an industrial dispute which it is desirable to prevent and from another aspect as showing a dispute already existing and fit to be settled by arbitration. . . . In the nature of things an industrial dispute may be prevented from coming into existence by various means, but the only means which the Parliament is authorized to employ are conciliation and perhaps arbitration. If, therefore, the state of things is such that there are no ascertainable parties between whom an ascertainable difference capable of being composed exists, the basis of arbitration is wanted." *Per* GRIFFITH, C.J., 11 C.L.R., at pp. 317-318.



Mr. Justice BARTON re-affirmed his opinion that arbitration was not applicable to the prevention of disputes : *id.*, pp. 324-325. Mr. Justice O'CONNOR was disposed to favour the broad interpretation of the power, as authorizing the use of arbitration for the purpose of preventing industrial disputes from arising, as well as for settling those that have arisen, but, he added :—" One can have no mental conception of arbitration without parties in difference over some matter capable of judicial adjustment by an arbitrator " : *id.*, pp. 327-329.

Mr. Justice ISAACS thought that, it being admittedly impossible to distribute the words *reddendo singula singulis*, it followed inevitably that the composite phrase "for the prevention and settlement" applied also to "arbitration" unless the inherent nature of the word was inconsistent with that application ; and he was satisfied that the word "arbitration" was wide enough to embrace a preventive determination. He agreed, however, that "arbitration" is not, any more than is "conciliation," an intelligible conception except where some difference can be perceived, and expressed in terms, however general, between the parties who are to be affected by the decision : *id.*, pp. 330-335.

In 1911 the definition of "industrial dispute" contained in section 4 of the Commonwealth Conciliation and Arbitration Act of 1904, was amended to include "any threatened or impending or probable industrial dispute." In answer to a question submitted by the President of the Arbitration Court whether that Court had cognizance, for the purpose of prevention and settlement of an industrial dispute which was "threatened or impending or probable," the High Court, by a majority, viz. : ISAACS, HIGGINS, GAVAN DUFFY and RICH, JJ. (BARTON, A.C.J. and POWERS, J. dissenting) answered in the affirmative : *Merchant Service Guild of Australia v. Newcastle and Hunter River Steamship Co. Ltd.*, (1913) 16 C.L.R., 591.

Mr. Justice ISAACS said :—" Looking at the Act itself and the decisions upon it, I take 'dispute' to mean a difference which has reached the stage of finality ; that is in which the parties find themselves in determined opposition, the demand being an ultimatum, and the refusal being absolute and both persistent. Paragraph III. 'threatened' refers to a difference clear as to subject matter but something short of that pronounced character. The parties are out

of agreement certainly, their point of non-agreement can be recognized and stated, not necessarily in detailed form, but intelligibly, but neither of the parties may have reached the point of final existence or even stated the ultimate details of their desires and intentions. It is properly speaking, a stage of discussion and *non-agreement* rather than established *disagreement* or *dispute* in its true sense. In that event, and at that stage prevention is quite possible to avert the acuteness of a dispute in its final form and may in my opinion be applied by arbitration." *Per* ISAACS, J., 16 C.L.R., 633.

Mr. Justice HIGGINS said :—"The Constitution allows laws for the prevention, as well as for the settlement, of actual industrial disputes; and when Parliament, by section 4 of the Act, says that 'industrial dispute' is to include 'any threatened or impending or probable industrial dispute' it is merely exercising its powers with regard to prevention of actual industrial disputes. The extended meaning is only 'in the Act,' and for the purposes of the Act. It cannot be laid down that, 'conciliation' in the Constitution applies only to 'prevention,' and 'arbitration' only to 'settlement' of industrial disputes. If that reading were right there could be no 'conciliation' for the settlement of an actual industrial dispute. Both terms—'conciliation and arbitration' refers to both terms—'prevention and settlement.' Nor is this position affected by the cheap and obvious criticism that you cannot arbitrate between people unless they are in an actual dispute. There are many cases in which the intervention of a conciliator-arbitrator may be most salutary, before the points of dispute have been formulated, before they have become 'fairly definite' within the language of *Conway v. Wade*, (1909) A.C., 506." : 16 C.L.R., at p. 643.

### § 87. "SETTLEMENT."

#### Penalization of Strikes.

The penalization of strikes is lawful as a means of settling disputes by arbitration; it is incidental to arbitration. In May 1917 Henry Stemp with other workers were on the information of the Australian Glass Manufacturing Co. Ltd. prosecuted in the Court of Petty Sessions, Melbourne, under section 6 (1) of the Conciliation and Arbitration Act (1904-1915) for that he, the defendant, being an employee of the said company did, on account of an industrial dispute extending beyond the limits of any one State (namely in the States of New South Wales, Victoria and South Australia),

on and between the 24th April 1917, and the date thereof, do something in the nature of a strike, in that the said defendant, did strike and wholly cease work with the said Company on and after the said 24th April 1917. Objection was taken on behalf of the defendant to the jurisdiction of the Court, on the ground that section 6 of the Commonwealth Conciliation and Arbitration Act 1904-1915 was beyond the power of the Commonwealth Parliament to enact. On the 8th June 1917, the Police Magistrate announced his decision, finding the charge proved, and fining the defendant £5, with £2 10s. costs. To review this decision, an order *nisi* was made by ISAACS, J., returnable before the High Court.

In support of the order *nisi* to review it was argued that section 6 was not within the legislative powers of the Commonwealth, and is void. The Court, *per* BARTON, A.C.J., ISAACS, HIGGINS and POWERS, JJ. (GAVAN DUFFY and RICH, JJ. dissenting), held that the impeached section was valid being within the legislative powers of the Commonwealth Parliament.

Mr. Justice BARTON, A.C.J., said :—" The enactment now challenged is designed to prevent the parties from proceeding to extremities after the inception of an inter-state industrial dispute, which gives jurisdiction to the Court. The Legislature could not enter on the work of executing the power by means of compulsory conciliation and arbitration, without being conscious that strikes and lock-outs were the most frequent and the most effective means of insisting on industrial demands, whether just or unjust and without observing their disastrous effects in keeping the parties at arms length, often in a protracted struggle accompanied with violence and always at great loss both to capital and labour. Resort to either of these drastic instruments was among the very things which it must be the very object of conciliation and arbitration to prevent or minimise. But more ; resort to either of them brought the parties necessarily into such strained relations with each other as rendered it the most difficult thing possible to bring them together for the settlement of their differences. Any strike or any lock-out in an industrial disagreement was calculated greatly to impede the effect of execution of the power granted to compose disputes, inasmuch as it rendered the objects of such legislation much more difficult of attainment. What then, was more natural and more reasonable than for Parliament to resolve to deal with strikes and lock-outs so far as they deemed it necessary and advisable to minimise their impedi-

ment to the effective execution of the power in question. That, I conceive, is what Parliament has done in this case, and I find it difficult to imagine a provision more conducive to the success of the legislation. To make this choice of means to an authorized end was to complement, and not to supplement, the power granted. To my mind, the sub-section is well within the authority granted to Parliament and I hold it valid."

Mr. Justice ISAACS said :—" In the highest sense, then, the provision in section 6 of the Act is incidental to the power in the Constitution. By ' incidental ' I mean in the sense I have explained in the passage quoted by Mr. Mann from my judgment in *Whybrow's Case*, 16 A.L.R., at p. 522. I do not repeat my words but the matter is summed up in the concluding phrase—" In the absence of express statements to the contrary you may complement but you may not supplement a given power." To that passage, and consistently therewith I add this quotation from *Story on the Constitution* (paragraph 1248)—" To employ the means necessary to an end is generally understood as employing any means calculated to produce the ' end, and not being confined to those single means without which the end would be entirely unattainable." Now what is the ' end ' with regard to the constitutional provisions ? It is unmistakably to provide, if necessary, by compulsive measures, that industrial disputes if not ended voluntarily shall be settled by Federal arbitration, so that the people of the Commonwealth shall not through inter-State disputes have the supply of their requirements interrupted : *Whybrow's Case*, 16 A.L.R., 513. I apply this to both parties to a dispute and to all forms of attempting to defeat the law, whether by striking or by dismissing employees for attempting to reach the arbitration tribunal. If the power were merely as to voluntary arbitration, of course all that could be done would be to make the tribunal as attractive as possible. But as it includes compulsive powers it necessarily includes all complementary means of making that compulsion effective."

" I have already shown the inherent contrariety between compulsion to submit to arbitration on the one hand, and permission to attempt or to assist in attempting self-redress on the other. It follows, in my opinion, logically and unanswerably that a provision fixing a penalty for participating in an attempt at forbidden self-redress—that is lawlessness—is incidental within the definition stated."

"From all standpoints, therefore, the result is that the contention that this remains a purely State power and that the Commonwealth Parliament acted *ultra vires* of its constitutional authority fails. The provision impeached is valid and that being the only question argued the appeals should be dismissed."

Mr. Justice HIGGINS said :—"In an Act by which Parliament provides a tribunal to conciliate and if necessary to arbitrate between industrial disputants on the basis of reason and fair play, Parliament says that the disputants shall not, nor shall others try to settle the dispute by the method of economic force or pressure—by 'strike' or 'lock-out.' A dispute cannot be settled by two inconsistent methods at the same time; and if the method of reason is to be followed, the method of force—economic force—must be prohibited. The method of physical force—violence—is sufficiently prohibited by the ordinary law. The prohibition of strike is therefore relevant to the constitution of a tribunal for industrial disputes." "I adhere to the view which I have expressed in previous cases, *The Trade Mark Case*, 14 A.L.R., 565, at pp. 612-615; *Australian Boot Trade Employees v. Whybrow*, 16 A.L.R., 513, at p. 523—that the form of words used in our Constitution—the power to make laws 'with respect to' any given subject—is wider in meaning than the form of words used in the Constitution of the United States—power (e.g. 'to lay and collect taxes,' or power 'to borrow money on the credit of the United States.' In my opinion, the prohibition of strikes is a law 'with respect to' the subject of pl. (xxxv.). But even if we take a narrower view of the power, if we read the power as if it were merely to make laws, 'for' conciliation and arbitration for the prevention, etc., I am of opinion that the prohibition of strikes comes within pl. (xxxix.) as a 'matter incidental to the execution of the power' conferred by pl. (xxxv.)."

Mr. Justice GAVAN DUFFY and Mr. Justice RICH were of opinion that so far as legislative power under section 51 is concerned, sub-section (xxxix.) probably does no more than expressly confer the powers which in its absence would have been implied under the preceding sub-sections, but whatever be its effect it does not enlarge the specific powers conferred by those sub-sections, but only adds a new power and that new power cannot be interpreted as authorizing an enactment so far removed from the execution of the power conferred by sub-section (xxxv.) as is the penalizing of a local striker.

Mr. Justice POWERS said :—" Once the power to order parties to settle disputes by compulsory arbitration is conceded, it appears to me the authority to effectuate it by prohibiting strikes is incidental to it. It is also reasonable and proper exercise of the power to prohibit strikes ; to make the power effective. . . . It is said that the power to prohibit strikes has been reserved to the States. As the States never had the power to deal with inter-state disputes that argument cannot prevail. It was because the States were powerless to deal with inter-state disputes, as such, the power was given to the Commonwealth Parliament to do so, and, I assume, to deal with them effectively " : *Stemp v. Australian Glass Manufacturing Co. Ltd.*, (1917) 23 C.L.R., 226.

### **Enforcement of Penalties.**

The Commonwealth Court of Conciliation and Arbitration as at present constituted is not a Court of judicature authorized to exercise judicial power of entertaining proceedings for the enforcement of its own awards by the imposition of penalties for breach thereof. Such awards can only be enforced by proceedings in the High Court or in State Courts invested with Federal jurisdiction. This question was raised in a dispute between J. W. Alexander & Co. Ltd. and the Waterside Workers' Federation which came before the President of the Court of Conciliation and Arbitration, Mr. Justice HIGGINS, on an application for enforcement of an award : (1918) 24 A.L.R., at p. 341. The point was then taken that the President, having been appointed to that office for seven years only and not during good behaviour as required by the Constitution, section 72, could not exercise judicial functions but only arbitral functions.

His Honor stated a case for the opinion of the High Court as follows :—

(1) Is the constitution of the Commonwealth Court of Conciliation and Arbitration beyond the powers of the Parliament of the Commonwealth, and in particular as to (a) the arbitral provisions ; (b) the enforcing provisions. (2) Is the award invalid by reason of the appointment of the President for seven years only ? (3) Is the award enforceable by the said Court ?

In a reserved judgment delivered on the 27th day of September, 1918, the majority of the High Court answered these questions as follows :—

- (1) (a) No ; the arbitration provisions are valid.
- (b) Yes ; the enforcing provisions are beyond the power of the Commonwealth Parliament.
- (2) No ; the award is not invalid by reason of the appointment of the President for seven years only.
- (3) No ; the award is not enforceable by the Arbitration Court.

The Chief Justice, Sir SAMUEL GRIFFITH, said that the suggested want of jurisdiction arose from the tenure of the office of the President of the Arbitration Court. This, it was suggested was inconsistent with the powers of the Constitution. It was impossible under the Constitution to confer judicial functions upon any body other than a Court, nor could the difficulty be avoided by designating a body which was not in its essential character a Court by that name, or by calling the functions by another name. The Constitution provided that Justices of the High Court, and of other courts created by the Parliament, be appointed by the Governor in Council, and not removed except by the same authority on addresses from both Houses of Parliament. These words had been rightly assumed to mean that the tenure of Federal Judges should be for life, subject to the power of removal. He was of opinion that the Arbitration Court was, as Parliament thought and intended it to be, a Court created by it. It followed that the judicial officer must hold office during good behaviour, and that an appointment for a less period was ineffectual. What, then, was the tenure of office of the President ? Section 12 of the Arbitration Act said that he was entitled to hold office during good behaviour for seven years, and he was to be appointed from among the Justices of the High Court. That was that he would be a person who already held judicial office during good behaviour. It was not expressed that he should be appointed for any definite term ; but that he would be entitled to hold office for seven years. The word "appoint" was often used to designate an executive act by which an office was conferred upon a person : but it was not, in law, confined to that meaning, it was synonymous with "direct or assign." The enactment might be read as merely requiring the Governor-General to assign one of the Justices of High Court to discharge the functions of President. He held the President was validly appointed for all the purposes of the Act and he answered the questions by saying that the constitution of

the Commonwealth Conciliation and Arbitration Court was not beyond the powers of the Parliament, that the award was not invalid by reason of the manner of the appointment of the President and that the award was enforceable by the Court.

Mr. Justice BARTON said that the Legislature had reposed part of the judicial power in the Court, both in the so called arbitral and in the enforcing provisions; the Act must be interpreted in the light of the judiciary provisions of the Constitution. He held that, as the head of a Federal-created Court, a President must be appointed in the sense which the Constitution required in section 72 and by the tenure prescribed in section 72. He could not separate the arbitral and enforcing provisions. He therefore held that in both the Court was beyond the powers of Parliament, that the award was invalid by reason of the appointment of the President for seven years, and that it could not be enforced.

Mr. Justice ISAACS reading the judgment of himself and Mr. Justice RICH, said that the Federal Constitution required that the judicial power should be vested in Courts of law and that these Courts be constituted by Justices, and any law passed under section 72, which said that a justice so appointed should be removed from his office in seven years, was contrary to the provisions of section 72 and was invalid. Enforcement by a Justice so appointed would be invalid. They did not agree that, because of this, the power to impose penalties could not be imposed in Courts of summary jurisdiction. They therefore held that the arbitral provisions of the Court were within the Constitution, that the enforcing provisions were beyond it, that the award was not invalid by reason of the appointment of the President for seven years, but that it was not enforceable by the Court.

Mr. Justice POWERS said that only the powers necessary for preventing and settling disputes could be given under the arbitration power. A power to enforce the awards was entirely different. These had been given to the Court to exercise judicial functions. He was satisfied that it was only to make this a Court of compulsory arbitration and not of judicature. He thought the parts were severable, and that the first question should be answered that the arbitral provisions were within the power of Parliament, and the enforcing provisions were beyond that power so far as they were to be enforced by a President to be appointed for seven years only



He also held that the award was not invalid by reason of the appointment for seven years, and on the third question he said that he did not think the award was enforceable under the arbitration power. It could only be granted under the judicial power, and the President had not been appointed in accordance with that section. The awards could be enforced in the State Courts, and Parliament could give power of enforcement to the High Court. If Parliament gave that authority, the President or Deputy President could, as a High Court Justice, enforce the awards.

Mr. Justice HIGGINS and Mr. Justice DUFFY were of opinion that the enforcing provisions were enforceable by the Court of Arbitration as well as by a Court of federal jurisdiction.

In consequence of this decision the amending Arbitration Act, No. 39 of 1918, was passed providing that penalties may be imposed by Courts of summary jurisdiction, viz.: any District, County or local Court or Court of summary jurisdiction . . . or by any State Court specified in that behalf by proclamation: (1918) 25 C.L.R., 435.

### § 88. "INDUSTRIAL."

#### **Industrial Organization.**

The Conciliation and Arbitration Act 1904, section 19B provides that the Court shall have cognizance of industrial disputes submitted to it by registered organizations. "Organization" is defined by section 55 as any association of employers or any association of employes "in connection with any industry." "Industry" is defined by section 4 as meaning any "business trade manufacture undertaking calling service or employment on land or water" etc.

#### **What it Connotes.**

In the *Jumbunna Coal Mine v. Victorian Coal Miners' Association*, 6 C.L.R., 309, it was unsuccessfully contended on behalf of the mining company that the word "industrial" in the Constitution is restricted to work connected directly or indirectly with manufacture and production. The Court held that the term "industrial" in the Constitution should not be construed in the narrower sense contended for but it should be understood to include all forms of employment in which large numbers of persons are employed, the sudden cessation of whose work might prejudicially affect the orderly conduct of the ordinary operations of civil life. *Per*

GRIFFITH, C.J., *Jumbunna Coal Mine v. Victorian Coal Miners' Association*, (1908) 6 C.L.R., at p. 333.

“There is nothing in the Constitution,” said O’CONNOR, J., “to show that the word was intended to be used in the narrower sense. On the contrary the scope and purpose of sub-section xxxv. would lead to an opposite conclusion. . . . It was to remedy the evils of industrial disturbances extending beyond the territorial limits of any one State that the power in question was conferred. It must have been well-known to the framers of the Constitution that such disturbances are not confined to industries connected directly or indirectly with manufacture or production. The case of cooks, stewards, waiters, hairdressers, are instances of trade which would not come within the narrower sense of the term ‘industry,’ yet it is well known that unions existed in those trades long before the enactment of the Constitution. There seems to be nothing in the Constitution itself to indicate that the power conferred was intended to cover part only of the evils aimed at. The words used are large enough to cover all of them, and where it becomes a question of construing words used in conferring a power of that kind on the Commonwealth Parliament it must always be remembered that we are interpreting a Constitution broad and general in its terms, intending to apply to the varying conditions which the development of our community must involve.” *Per* O’CONNOR, J. in the *Jumbunna Coal Mine v. Victorian Coal Miners' Association*, (1908) 6 C.L.R., at pp. 365-368.

“For many years before the passing of the Constitution, the expression ‘industrial dispute’ was in common use in Australia and New Zealand as describing a dispute between bodies of workmen and their employers as to terms of employment. In the same sense the term was applied in England by well-known writers on industrial matters by public men and by journalists. Sometimes, as in the English Conciliation Act (1896) and earlier statutes, the expression used was ‘trade dispute.’” *Per* O’CONNOR, J. in *The Federated Sawmillers' and Woodworkers' Case*, 8 C.L.R., 465.

The shipping industry is an industry within the meaning of the Commonwealth Conciliation and Arbitration Act: *Amalgamated Society of Engineers v. Australian Institute of Marine Engineers*, (1909) 9 C.L.R., 48.

A dispute relating to the legal rights and obligations of employers or employees under an admitted agreement is not an industrial dispute within the meaning of the Constitution. The term "industrial dispute" may be, and has been, used in that sense in statutes which so defined it, but that fact is quite irrelevant. Such a dispute can be settled by the ordinary State tribunals. A refusal by A. or B. to perform an admitted agreement, the interpretation of which is not in question, is not an industrial dispute. *Per* GRIFFITH, C.J., *Federated Sawmillers' and Woodworkers' Case*, 8 C.L.R., at p. 489.

A claim that a union agent should have a right, without the pastoralist's permission, to visit the shearers' huts during shearing, in order to enrol members and collect their subscriptions, was held not to be an industrial matter within the meaning of the Act. *Per* O'CONNOR, J. in *The Australian Workers' Union v. Pastoralists*, (1907) 1 C.A.R., at p. 95.

#### **Badge Case.**

In the *Tramway Case*, (1913) 17 C.L.R., 680, the High Court held that the wearing of a badge of membership of a union was an industrial matter.

#### **Journalist Case.**

The question of whether the Australian Journalists' Association (a registered organization) is properly registered as representing an industry was before the Full High Court in 1918 and was recently argued in prohibition proceedings against the award of ISAACS, J. in the *Journalists' Case*. It was held that a dispute between newspaper reporters and newspaper proprietors as to rates of pay is an industrial dispute within the meaning of the Act. *The Journalists' Case*, "The Argus," 12th June, 1919.

#### **Crafts and Vocations.**

The Federated Engine-Drivers' and Firemen's Association of Australasia consisted of members who were engaged in what was described as "land engine-driving and firing." They were employed driving or firing engines in many and different undertakings, *e.g.*, mines, timber-yards, tanneries, soap and candle works, electrical works, etc. It was registered as an organization under the Act on the 2nd of March 1908.

In October 1910 the organization filed a plaint in the Commonwealth Arbitration Court, citing the owners of engines throughout

the Commonwealth, including the Board of the Water Supply, Sydney, and the Corporation of the City of Melbourne ; alleging an inter-state industrial dispute respecting wages and employment conditions and claiming an award. Objection to registration having been taken before the President he stated a case for the opinion of the High Court on the question " Is the Association of Land Engine-drivers and Firemen an Association one that can be registered under the Act ? " In support of the objection it was argued that in order to constitute an industrial dispute there must be a dispute in an industry, and an industry is something which deals with the production or distribution of commodities. There must be some claim put by one party to another. There must be some *nexus* between the members of the class putting forward the claim. That *nexus* is to be found either in the industry in which they are employed or in some historical association in industries which have been worked together. In support of the claim it was replied that the word " industry " may be looked at from the employees' view as well as from the employers' view. In the former case a man's calling, in the ordinary sense, is his industry. His industry is determined, then, by the class of work he does, *e.g.*, engine-driving, carpentering. His employer may then be said to be connected with that industry, and a number of employers connected with that industry could form an organization.

The High Court held that the industrial dispute must be single in the sense that there must be a community of interest among the demandants and among those who refuse the demand ; that the industry contemplated by the Act was one in which both employer and employee are engaged not merely in an abstract sense. There could be no such community of interest between a farmer who employs an engine-driver to drive a stationary engine in Queensland and a company which employs drivers of locomotive engines in Tasmania. The Act as it stood did not contemplate the regulation of wages or the hours of labour for the whole body of persons engaged in the same vocation but employed in different industrial enterprises. The Court, however, answered the question in the negative, and the claim for the time being failed. The Court decided that the definition of industry in the Act did not cover craft unions such as engine-drivers and firemen, but was confined to industrial organizations such as, *e.g.*, the flour mill employees under which might consist of everybody in the industry (including millers, engineers,

etc.). *The Federated Engine-Drivers' and Firemen's Association of Australasia v. The Broken Hill Proprietary Co. Ltd. and others*, (1911) 12 C.L.R., 398.

### **Retrospective Act.**

This decision was given on the 27th of June 1911. On the 23rd of November, 1911, before the President had further dealt with the case a Federal Act (No. 6 of 1911, sub-section 3) was passed amending the definition of "industry" in the principal Act to read as follows :—" Industry includes (a) any business, trade, manufacture, undertaking, or calling of employers on land or water ; (b) any calling, service, employment, handicraft, or industrial occupation or avocation of employees, on land or water ; and (c) a branch of an industry and a group of industries."

" Any registration, as an organization under the Principal Act. of any association purporting to be registered before the commencement of this Act shall be deemed to be as valid to all intents and purposes and to have constituted the association an organization as effectually as if this Act had been in force at the date of the registration " : section 4.

Subsequently the plaint was again brought before the President and he was asked on the strength of the validating Act to make an award. The President stated a second case for the opinion of the High Court on the following question :—" Has this Court power now that the Commonwealth Conciliation and Arbitration Act 1911, section 4, has been passed to make an award in this case at the instance of the claimant " ?

It was held by GRIFFITH, C.J. and BARTON, J. (ISAACS, J. and HIGGINS, J. dissenting) that section 4 of the latter Act only operated so as to validate the plaint as from the date of the passing of the latter Act : (1913) 16 C.L.R., 245.

## **§ 89. "DISPUTE."**

### **Statutory Definitions.**

The statutory definition of industrial matters includes "all rights and privileges of employees" and the "terms and conditions of employment" and "all matters pertaining to the relation of employers and employees."

**Plaint must Embody the Dispute.**

The Conciliation and Arbitration Court cannot exercise jurisdiction under section 19 of the Conciliation and Arbitration Act 1904 unless there is in fact such a dispute which has been submitted to the Court for settlement in one of the methods stated in that section, and, in the case of a dispute submitted by plaint, the plaint should be sufficiently definite to indicate to the Court and to the other parties the subject-matter of the dispute. Though the Court is not bound to award the particular form of relief claimed in the plaint, and though it may, under section 38, sub-section (u) deal with all matters incidental and ancillary to the dispute submitted to it, and make such order as it deems expedient for the settlement of the dispute, it has no jurisdiction to make an award as to matters not substantially involved in or connected with the dispute.

**Conditions of Jurisdiction.**

There are three conditions necessary to give the Commonwealth Conciliation and Arbitration Court jurisdiction. The dispute must be an industrial dispute between an employer and workers. It must extend beyond the limits of one State. It must be duly brought under the cognizance of the Court under one of the sub-sections of section 19 which provides other means than by plaint for giving the Court cognizance of disputes. The Court cannot make an award in regard to matters not claimed in the application. It cannot, by prescribing a particular form of relief, give itself jurisdiction to decide the dispute which the parties have not submitted to it. Hence in *The King v. The Commonwealth Court of Conciliation and Arbitration, etc., etc.*; *Ex parte Broken Hill Proprietary Ltd.*, (1909) 8 C.L.R., 419, the High Court granted a prohibition to restrain the enforcement of an award so far as it purported to direct 48 hours per week work at Port Pirrie; so far as it purported to direct that overtime should be paid at a higher rate at Port Pirrie than elsewhere; and so far as it purported to direct that no contracts should be set by the Company except what were previously recognized; these matters not having been raised in the plaint.

The Commonwealth Conciliation and Arbitration Act (1910) empowered the Court to amend any plaint in industrial disputes at any time and to grant relief other than that claimed in that plaint; to appoint Boards of Reference to settle details and incidents of

awards ; authorized the President to convene compulsory conferences of disputants for the purpose of preventing or settling disputes and to refer such disputes to the Court.

### **Want of Pre-concert in Demand and Refusal.**

If all the circumstances exist necessary to constitute an industrial dispute extending beyond the limits of one State, including a demand by combined and organized employees on their employers, want of pre-concert on the part of the employers in refusing the demand does not either under section 51 (xxxv.) of the Constitution or under the Commonwealth Conciliation and Arbitration Act 1904 deprive the Commonwealth Court of Conciliation and Arbitration of jurisdiction to make an award on a plaint brought before the Court by the organization of employees : *The Federated Saw Mill, Timber Yard, and General Woodworkers' Employees' Association of Australasia v. James Moore & Son Proprietary Ltd.*, (1909) 8 C.L.R., 465.

It was contended in the *Sawmillers' Case* that it was essential in order to constitute an industrial dispute, both parties to the dispute must have combined and that where the employers acted independently and without pre-concert, in refusing the demands, there could not be a dispute within the meaning of the Constitution. "The plain answer to that question," said O'CONNOR, J., "is that the Constitution authorizes no such limitation of the meaning of the term 'industrial dispute'." : *The Federated Sawmillers' Case*, (1909) 8 C.L.R., at p. 506.

There must be all the elements and circumstances which constitute an industrial dispute extending beyond the limits of one State, including the demand of combined and organized employees on their employers. Want of preconcert on the part of the employers in refusing such demands does not deprive the Arbitration Court of jurisdiction to make that award. It was so held by O'CONNOR, ISAACS and HIGGINS, JJ. *Per* GRIFFITH, C.J. :—"The absence of such preconcert may be evidence to negative the existence of a dispute." *Federated Sawmillers' Case*, (1909) 8 C.L.R., 465.

### **Pre-existing Dissatisfaction.**

In the case of a demand made by or on behalf of employees on their employer and refused by him or not conceded pre-existing dissatisfaction communicated to or known by the employer before

the demand is not always a necessary element to constitute an industrial dispute nor is it necessary as evidence of a genuine and real demand : *Merchants Service Guild of Australasia v. The Newcastle and Hunter River S.S. Co. Ltd.* (No. 2), (1913) 16 C.L.R., 705.

### **Formal Demand and Refusal Not Sufficient.**

The term industrial dispute connotes a real and substantial difference having some element of persistency and likely, if not adjusted, to endanger the industrial peace of the community. Such a dispute is not created by a mere formal demand and formal refusal. A letter was sent by the Secretary of an association consisting of masters and officers of ships employed by shipowners in the several States to each of those owners, 83 in number, stating that he was instructed to request that within 15 days certain specified terms and conditions of employment should be the subject of an industrial agreement between the particular employer and the association which should be filed under Commonwealth Conciliation and Arbitration Act ; that, to the extent that this demand was inconsistent with any award or industrial agreement, he demanded a variation of such award or agreement, that, failing the consent of all the employers to be bound in an industrial agreement in the terms aforesaid at the expiration of 15 days the association had been requested to submit " the dispute " by plaint to the Commonwealth Court of Conciliation and Arbitration, and that, should it then be found that that Court was unable to make a settlement " Your employees will themselves take action to compel you and all other employers to observe " the specified conditions ; and also stating that, " should you feel that any good purpose would be served by your convening, within the period mentioned, a conference representative of the whole of the employers in the shipping industry, I am instructed to state that your employees ask for such conference and the representatives of your employees will be pleased to attend thereon." There was no prior knowledge by, or communication to, the employers of any discontent on the part of their masters or officers or any of them with the conditions of their employment. Some of the employers answered the letter, but none of the demands were acceded to by any of the employers. Six weeks afterwards a plaint was filed in the Commonwealth Court of Conciliation and Arbitration claiming the terms and conditions above mentioned, and an award was made by the Court.



It was held by the High Court, GRIFFITH, C.J. and BARTON, J., ISAACS, J. dissenting, that no " industrial dispute " within the meaning of section 51 (XXXV.) of the Constitution existed, and, therefore, that the Commonwealth Court of Conciliation and Arbitration had no jurisdiction to make an award : *The King v. The Commonwealth Court of Conciliation and Arbitration and the Merchants Service Guild of Australasia ; Ex parte Allen Taylor & Co. and Others*, (1912) 15 C.L.R., 586.

#### **Joint Claim only not Sufficient.**

There must be something more than a joint claim or joint demand by the employees against the employers in order to constitute an industrial dispute within the meaning of the Act. An actual, threatened, impending or probable dispute may be sufficient to give the Arbitration Court jurisdiction either by way of arbitration or conciliation : *The Federated Felt Hatting Employees' Union v. The Denton Hat Mills (Felt Hatters' Case)*, (1914) 18 C.L.R., at p. 88.

#### **Real, Not Fictitious.**

There must be disputants taking opposite sides. There must be a real and substantial difference having some elements of persistency. The dispute must be real, not fictitious or illusory. It is not created by a mere formal demand and refusal. If there is no real discontent a mere claim or request for the purpose of making a claim in the Arbitration Court does not constitute an industrial dispute. It is rather an attempt to promote strife and a fraud on the tribunal. *Per* GRIFFITH, C.J., in *The Federated Sawmillers' Case*, (1909) 8 C.L.R., at p. 488.

#### **Different Rates of Wages.**

Where part of the demand made by an organization of employees is that the wages in one State shall be higher than those in the other States the Commonwealth Court of Conciliation and Arbitration may, nevertheless, make an enforceable award in respect of the employees in that State.

In *The Federated Sawmillers' Case*, (1909) 8 C.L.R., 465. it was contended that a claim of an industrial organization which is the foundation of the dispute must be for uniform rates of wages or uniform conditions of employment throughout the whole area

covered by that dispute ; that the claim of the complainant organization for an additional 15 per cent. increase to its members in Western Australia would prevent the Commonwealth Arbitration Court from having jurisdiction to entertain it. Referring to this contention. O'CONNOR, J. said :—" It is obvious that the Federal Convention and the British Legislature must have been well aware that Australia was a country of varying climates and conditions of life ; that the cost of living, for instance, would give the same amount of wages different effective values in different parts of the Commonwealth. It is difficult to imagine any industrial dispute extending beyond the limits of one State in which relations of employer and employee could be fairly adjusted without some regard to the differing economic and climatic conditions prevailing in different States. If, for example, the respondents' contention is right, the Federal Arbitration Court would have had no jurisdiction to settle the dispute between the shearers and the pastoralists—a dispute upon which it recently adjudicated. That dispute extended over four States and different rates were claimed for New South Wales, Victoria and South Australia and certain parts of Queensland. The award recognized and gave effect to these differences of rates, and no settlement could be workable which failed to give effect to them. It is obvious that construction of the sub-section which would shut out an industrial dispute, so clearly within the words, and the intention of the Constitution, demonstrates the impracticability of the contention " : 8 C.L.R., at p. 506.

### **Industrial War.**

The term " industrial dispute " connotes something in the nature of industrial war existing or threatened. A general refusal to obey the law relating to industrial matters cannot be an element of an industrial dispute nor is discontent with a State law an element of such a dispute. *Per* GRIFFITH, C.J. in *The Federated Sawmillers' Case*, (1909) 8 C.L.R., at p. 489.

### **Threatened, Impending or Probable Dispute.**

The majority of the High Court, *per* ISAACS, HIGGINS, GAVAN DUFFY and RICH, JJ., BARTON, A.C.J. and POWERS, J. dissenting, held that the President could in a special case ask the question—" If an industrial dispute is threatened or impending or probable, has the Arbitration Court cognizance thereof for the purpose of

prevention or settlement" ? : *The Merchants Service Guild of Australasia v. Newcastle and Hunters River S.S. Co. Ltd.*, (1913) (No. 1). 16 C.L.R., 594.

Mr. Justice HIGGINS said :—"The term 'industrial disputes' in section 51 (xxxv.) of the Constitution means actual existing industrial dispute ; and Parliament cannot by a definition of the term in section 4 of the Conciliation and Arbitration Act extend the meaning of the term in the Constitution. But the Constitution allows laws for the prevention as well as for the settlement of actual industrial disputes, and when Parliament, by section 4 of the Act, says that 'industrial dispute' is to include 'any threatened or impending or probable industrial dispute' it is merely exercising its powers with regard to prevention of actual industrial disputes. The extended meaning is only 'in the Act' and for the purposes of the Act. It cannot be laid down that 'conciliation' in the Constitution applies only to 'prevention,' and 'arbitration' only to 'settlement' of industrial disputes. If that reading were right there could be no 'conciliation' for the 'settlement' of an actual industrial dispute. Both terms 'conciliation and arbitration'—refer to both terms—'prevention and settlement.' Nor is this position affected by the cheap and obvious criticism that you cannot arbitrate between people unless they are in actual dispute. There are many cases in which the intervention of a conciliator-arbitrator may be most salutary before the points of dispute have been formulated."

In the *Felt Hatters' Case* the President stated for the opinion of the Court the question whether he would on the evidence be justified in finding that there was an "actual, threatened, impending or probable dispute," and in proceeding to investigate the merits under the Commonwealth Conciliation and Arbitration Act 1911. The majority of the Court answered the question in the affirmative : *The Federated Felt Hatting Employees' Union v. Denton Hat Mill Ltd.*, (1914) 18 C.L.R., 88.

### No Real Grievance.

The President of the Commonwealth Court of Conciliation and Arbitration on the application of an organization of tramway employees, made an award purporting to bind a tramway company in Queensland and a tramway trust in South Australia. An application was made to the High Court for a prohibition. It was held by GRIFFITH, C.J. and BARTON, GAVAN DUFFY and RICH, JJ. ISAACS

and POWERS, JJ. dissenting) that upon the evidence there was no dispute extending beyond the limits of any one State, inasmuch as assuming the organization of employees to have validly served on the employers in several States a demand in the form of a log of conditions of employment which the employers were required to adopt and that the demand had not been acceded to by the employers, yet that demand did not represent the real grievances of any body of employees but was put forward by the organization merely as means of invoking the jurisdiction of the Commonwealth Court of Conciliation and Arbitration and obtaining from it an award on the most favourable terms possible and, therefore, that the President had no jurisdiction to make the award: 19 C.L.R., 43, 44.

### No Proper Organization.

It was further held by GRIFFITH, C.J. and BARTON, J. on the evidence (1) that the alleged dispute was not submitted to the Court by an organization but by an irregular voluntary association of persons assuming to act in its name; (2) that at the date of the award there was no subsisting dispute extending beyond a single State, or that if there was it did not extend to Queensland: *The King v. The Commonwealth Court of Conciliation and Arbitration; Ex parte Brisbane and Adelaide Tramways &c.* (Tramways' Case, No. 2), (1914) 19 C.L.R., at pp. 43 and 44.

### Indicia of Federal Industrial Dispute.

In *The Federated Sawmillers' Case*, 8 C.L.R., 465, at p. 490, Chief Justice (Sir SAMUEL GRIFFITH) gave the following essential features of a Commonwealth industrial dispute:—

“ It connotes something in the nature of industrial war existing or threatened extending from one State to another State. It must be single in the sense that there must be a substantial community of interest amongst the demandants and amongst those who refuse the demand. There must be a substantial identity of subject matter. Mere identity of branch of industry is not sufficient of itself to prove substantial identity of subject matter. There might be substantial identity of subject matter although the branch of industry in connection with which it is made are not the same. There must be a real community of action on the part of the demandants, and some community of action on the part of the parties on whom the demand is made. Such community need not be formulated in any written

document, nor need the parties who are acting together be bound by any formal agreement. If it is found that large bodies of men in two or more States are in fact acting with one accord, then, if the other elements of an industrial dispute are present, an occasion arises for the exercise of the federal power in question.

“ The dispute must be actually existing and actually extending beyond the limits of one State before such an occasion can arise. Mere mischief makers cannot, therefore, by the expenditure of a few shillings in paper, ink, and postage stamps, create such an occasion.”

“ Mere sporadic differences confined to small localities in two or more States, even if they possess all the other elements of substantial identity of subject matter, cannot be said to extend beyond the limits of one State merely because the parties to the differences in the several States combine in making a request in identical terms to their respective employers.”

“ Mere verbal coincidence in demands made as regards two States does not prove identity of subject matter. The varying conditions of climate and other physical conditions found in the Commonwealth may make a demand couched in particular language in respect of one State quite different in its essence from a demand couched in the same words in respect of another.” *Per GRIFFITH, C.J., 8 C.L.R., at p. 490.*

In the *Felt Hatters' Case*, (1914) 18 C.L.R., at p. 93, the Chief Justice (Sir SAMUEL GRIFFITH) gave the following further description, negative and positive, of a Commonwealth industrial dispute. A dispute must be something more than a claim to have the conduct of an industry regulated. It must be a real dispute of such a nature as to indicate a real danger of dislocation of industry if it is not settled. Unfortunately attempts have sometimes been made to take advantage of this provision of the Constitution for the purpose of creating so-called disputes, not for the real purpose of preserving industrial peace but for the purpose of taking control of industry out of the hands of employers. “ In my opinion,” said the Chief Justice, “ such attempts are a fraud upon the Constitution and ought to be so treated. Such machine-made disputes are not, in my opinion, industrial disputes at all within the meaning of the Constitution and cannot be said to be disputes extending beyond

the limits of any one State merely because of the identity of the language in which the claims are made, or because the claim relating to the operations of the same industry carried on in two or more States is comprised in a single document. In short, the object of the power is to prevent and settle real industrial disputes and not to facilitate the creation of fictitious disputes with a view to their settlement by a Commonwealth tribunal": (1914) 18 C.L.R., at p. 94.

### Union Badge.

In the *Australian Tramway Employees' Association v. The Prahran and Malvern Tramway Trust and other Tramway Authorities*, 17 C.L.R., 680, the President of the Commonwealth Court of Conciliation and Arbitration stated for the opinion of the High Court the question whether the claim of the employees to wear distinctive union badges visibly whilst on duty and the refusal of the tramway owners to allow the practice was an industrial dispute. The majority of the High Court, ISAACS, HIGGINS, POWERS and RICH, JJ. (BARTON, A.C.J., dissenting) answered the question in the affirmative.

Mr. Justice ISAACS, for himself and RICH, J., said:—"The direct object of the claim to wear a badge as a mark of unionism is to place the workers in a stronger position relatively to their employers with respect to the conditions of their employment; that it has considerable force in that connection is admitted, and it is therefore naturally a term of employment in the true sense if agreed upon, and if it be so when agreed upon it is so when demanded or refused, and when exclusion from the employment is insisted on as a consequence of persistence. Parties may, if they choose, by consent, make any stipulation a 'term' of employment, and any condition, a 'condition' of employment. If, without prior consent upon the subject, employers insist on dismissing men because they will or will not wear a hat of a particular shape, or boots of a particular colour, or a special appendage or symbol on their watch chains, we are unable to see how they can at the same time consistently aver that the matter in issue has no reference to the employment, or how a quarrel over the matter does not constitute an industrial dispute. A refusal for instance, to wear prison-made uniforms supplied by the employers, if the employers insist on dismissal for that refusal, appears to us to be an instance of undoubted subject matter for an industrial dispute, and yet it does not affect the quantity or quality or value of the work done by the employees.

On the whole, therefore, we disclaim not only the desirability but even the power to restrict the simple and unqualified word 'industrial' as it stands in the Constitution by any cast iron definition which the framers of that instrument omitted. It is sufficient to say that the words of the statute comprehending this particular dispute fall easily within it": (1913) 17 C.L.R., 704.

Mr. Justice HIGGINS said :—" The Act, however, by its definition of ' industrial dispute ' and ' industrial matters , ' seems to be confined to disputes between employers and employees. But ' industrial matters ' under the definition, include ' all matters pertaining to the relations of employers and employees. ' To be more specific, the dispute whether the employees here should be forbidden by their employers to wear a badge when on duty on the tram-cars, is a matter ' relating to privileges ' of the employees, as well as to the ' rights or duties of employers or employees, ' and to the ' terms, and conditions of employment, ' within the definition. The abundance of words in this definition, words which are not mutually exclusive or capable of rigid demarcation, would appear to be intended to prevent any such argument as is used in this case in favour of a narrow interpretation of the ruling expression—' all matters pertaining to the relations of employers and employees. ' "

Mr. Justice POWERS said :—" The wearing of the union badge on the facts stated in the case, tends to consolidate and strengthen the organization in its endeavours to obtain for the employees better industrial conditions from the employers. The wearing of the badge is objected to by the employers (amongst other grounds) because it is an encouragement to ' unionism. ' This statement in the case places the claim, in my opinion, on the same plane as a unionist claim not to work with non-unionists or with coloured labour. They are all based on unionists' claims to further unionism and its aims to maintain existing industrial conditions obtained through unionism " : (1913) 17 C.L.R., at pp. 704-713.

### Preference to Unionists.

The Conciliation and Arbitration Act, section 4, gives power to the Court to grant preference to unionists. In *The King v. Commonwealth Court of Conciliation and Arbitration and the Australian Tramway Employees' Association*; *Ex parte Brisbane Tramway*

*Company and Adelaide Tramway Trust (Tramway Case, No. 2)*, (1914) 19 C.L.R., at p. 81, the Chief Justice (Sir SAMUEL GRIFFITH) said he did not think there was evidence of a dispute as to preference in Queensland and certainly there was no dispute extending beyond that State. The award of preference was confined to Queensland alone and was therefore bad. It was further objected that by the Industrial Peace Act of 1912 of Queensland which was passed before the date of the award discrimination against any persons on the ground of membership or non-membership of any association or organization of employees is prohibited under a penalty. The Chief Justice said that in *Whybrows' Case*, 10 C.L.R., 266, it was held by the High Court that the Arbitration Court is bound by State laws lawfully made and has no jurisdiction to require any one to do an Act forbidden by such law. "This also," said the Chief Justice, "is the fatal objection to that part of the award." Prohibition to prevent enforcement was granted.

#### **Forms of Employment Included in Dispute.**

An industrial dispute exists where a considerable number of employees engaged in the same branch of industry make common cause in demanding a change in their conditions of employment which are denied by the employers. *Per* GRIFFITH, C.J. in the *Jumbunna Coal Mine No Liability v. Victorian Coal Miners' Association*, (1908) 6 C.L.R., at p. 332.

Industrial disputes within the meaning of the Act, are not restricted to works connected directly or indirectly with the production or manufacture of goods. It includes all forms of employment in which a large number of persons are employed, including cooks, stewards, waiters, hairdressers, etc.: *Jumbunna Coal Mine v. Victorian Coal Miners' Association*, (1908) 6 C.L.R., at p. 332.

A claim for leave of absence on full pay may be a dispute: *The King v. The Commonwealth Court of Conciliation and Arbitration and the Merchants Service Guild*; *Ex parte Allen Taylor and Another*, (1912) 15 C.L.R., 586.

A mere refusal to recognize or perform legal rights and obligations as to existing claims is not an industrial dispute: *Federated Woodworkers' Case*, (1909) 8 C.L.R., 465.



The shipping industry including marine engineers is within the meaning of the Act : *Amalgamated Society of Engineers v. Australian Institute of Marine Engineers*, (1908) 9 C.L.R., 48.

The dispute need not be confined to one industry ; one dispute may embrace several industries and there may be several disputes in one industry : *The King v. The Commonwealth Court of Conciliation and Arbitration and the Barrier Branch of the A.M.A.* ; *Ex parte Broken Hill Proprietary Co. Ltd.*, (1908) 8 C.L.R., at p. 431. *The King v. The Commonwealth Court of Conciliation and Arbitration and the Merchants Service Guild of Australasia* ; *Ex parte Allen Taylor and Others*, (1912) 15 C.L.R., at p. 601.

The claim of a union agent to visit the shearers' hut during the shearing time in order to enroll members and collect dues without the pastoralist's consent may involve a dispute within the Act : *Australian Workers' Union v. Pastoralists, &c.*, (1907) 1 C.A.R., at p. 95.

### **Form of Case Stated for the Opinion of the High Court.**

By the Commonwealth Conciliation and Arbitration Act, section 31 (2), the President of the Court may, in any dispute coming before him for determination, state the case for the appeal of the High Court. In the *Merchants Service Guild of Australasia v. Newcastle and Hunters River S.S. Co. Ltd.* (No. 1), (1913) 16 C.L.R., 592, the President stated a case and asked the questions :—(1) On the facts stated in the said affidavits is there an industrial dispute within the meaning (a) of the Constitution, (b) of the said Act, and between whom ?

It was held, by BARTON, A.C.J., ISAACS and POWERS, JJ. (HIGGINS, GAVAN DUFFY and RICH, JJ. dissenting), (1) that a question asked by the President in a case stated by him for the opinion of the High Court under section 31 (2) must be really a question of law, and, notwithstanding the provisions of section 31 (2) the opinion of the President that the question asked is a question of law is not binding on the High Court ; (2) that the case so stated must also set out the facts upon which the question of law arises, and the High Court is not entitled to draw inferences of fact from the facts so stated. Mr. Justice ISAACS said :—" The first question asks whether on the facts stated in the affidavits there exists an industrial dispute. That plainly involves a question of fact, that is to say, whether the

parties are really in dispute with each other. The Court, having no jurisdiction to answer a question of fact, cannot answer question 1. Even the evidentiary facts of the reality of demand, and of the definite refusal are unstated."

### Indicia of Dispute.

In the *Merchants Service Guild of Australasia v. Newcastle and Hunters River S.S. Co. Ltd.* (No. 2), (1913) 16 C.L.R., 705, the President stated a case for the opinion of the High Court and asked the following questions :—(1) What are the necessary *indicia* of an actual " industrial dispute " within the meaning of the Constitution and of the Act ? (2) In the case of a demand made by or on behalf of employees and their employers and refused or not conceded is pre-existing dissatisfaction, communicated to, or known by the employers before the demand, always a necessary element to constitute an industrial dispute or to make the demand real and genuine."

It was held by BARTON, A.C.J. and GAVAN DUFFY, POWERS and RICH, JJ. (ISAACS and HIGGINS, JJ. dissenting), that the question " What are the necessary *indicia* of an industrial dispute within the meaning of the Constitution and of the Act " was not a question " arising in the proceeding," within the meaning of section 31 (2) of the Act, and therefore, although stated by the President to have arisen in the proceeding and to be in his opinion a question of law, was not one which the High Court should answer. It was further held by the whole Court, that, in the case of a demand made by or on behalf of employees on their employers and refused or not conceded pre-existing dissatisfaction, communicated to or known by the employers before the demand is not always a necessary element to constitute an industrial dispute or to make the demand real and genuine.

Mr. Justice BARTON, A.C.J., said :—" Question No. 1 is merely an abstract question of law and it does not appear that an explanation of all the necessary *indicia* of an actual ' industrial dispute extending beyond the limits of any one State ' is at all necessary to enable the Court to hear and determine the proceeding. In my own judgment, it is scarcely possible to give such an explanation because what is necessary in one case may not be so in another, though in both cases it may be relevant evidence."

**§ 90. "EXTENDING BEYOND THE LIMITS OF ANY ONE STATE."****Sympathetic Dispute.**

Where certain employees in New South Wales were in dispute with their employers and certain employees in Victoria and Queensland subscribed to the same demands as the employees in New South Wales, demands which they had not made and would not have made except to help the employees in New South Wales by making the dispute a dispute extending beyond the limits of one State—it was held by the Commonwealth Court of Conciliation and Arbitration that the dispute was not a genuine dispute extending beyond the limits of one State and that therefore an award could not be made: *Federated Engine-Drivers' and Firemen's Association of Australasia v. Caledonian Coal Co. Ltd.*, (1910) 4 C.A.R., 52.

**Different Branches of one Industry in two Different States.**

When the workers engaged in the service of a single employer in two different branches of one industry carried on in two different States, one branch mining for ores, being in Broken Hill, New South Wales, and the other branch, smelting the ores, recovered in mining, being carried on in Port Pirrie (South Australia) take concerted action in making a common demand of their employer for certain conditions of employment, and the employer, understanding that the demand is so made on behalf of all the employees, refuses to accede to it, there arises an industrial dispute extending beyond the limits of one State within the meaning of section 51 (xxxv.) of the Constitution, cognizable by the Commonwealth Court of Conciliation and Arbitration: *The King v. The Conciliation and Arbitration Court*; *Ex parte Broken Hill Proprietary Co. Ltd.*, (1909) 8 C.L.R., 419-420.

**Concerted Action by Workers.**

If the workers throughout the State in the same trade unite in making a demand from their respective employers, and the workers so united obtain the corporation of their fellow workers in that same trade in another State in such a way that the combined workers in both States take concerted action against their respective employers there is an industrial dispute extending beyond the limits of the first mentioned State. *Per O'CONNOR, J.* in the *Jumbunna Coal Mine Case*, (1908) 6 C.L.R., at p. 352.

**Two States' Disputes.**

The Federal arbitration power, said Mr. Justice HIGGINS, is applicable only to two State disputes. Like the inter-state commerce power, the inter-state industrial power cut across all the reserved powers of the States. It can only be exercised when the disputes are so formidable and wide-spread as to extend to more than one State, when the wages boards and other devices of the States are incompetent to deal with the dispute. It is not primarily a power to fix conditions of labour—it is a power to settle disputes; but if, for the purpose of settling a dispute, the Federal Court finds it necessary to fix labour conditions, it can do so; and its award, by virtue of the provisions of the Constitution, prevails over any regulations of labour made by the State on the lower plane. *Per HIGGINS, J. in the Australian Boot Trade Employees' Federation v. Whybrow and Others*, (1910) 10 C.L.R., at p. 336.

**Inter-State and Intra-State Traffic.**

In the plaint by the Merchants Service Guild of Australasia against a number of respondents of whom some were owners of ships engaged in inter-state trade and others were owners of ships engaged in intra-state trade, the President of the Court of Arbitration had made an award. Three of the respondents, shipowners engaged in the intra-state shipping trade of New South Wales, South Australia and Tasmania respectively applied to the High Court for a prohibition against further proceedings on the plaint and the award. It was argued on their behalf that there could not in their case be a single dispute "extending beyond the limits of any one State," because the coastal trade of one State was distinct from that of another, and they as employers had no common interest with one another. The High Court held, however, that there might be a single industrial dispute embracing both inter-state and intra-state shipping: *The King v. The Commonwealth Court of Conciliation and Arbitration and the Merchants Service Guild of Australasia; Ex parte Allen Taylor and W. Holyman*, (1912) 15 C.L.R., at p. 586.

**State to State Extensions.**

It is clear that the "extension" of the dispute referred to by sub-section (xxxv.) is an extension from one State into another or other States of the Commonwealth. An extension from one State to extra-territorial waters, or to some country extraneous to

the Commonwealth, cannot be intended. *Per* BARTON, A.C.J. in the *Merchant Service Guild of Australasia v. The Commonwealth Steamship Owners' Association*, (1913) 16 C.L.R., at p. 676.

### **Industrial Awards on the High Seas.**

In the *Merchants Service Guild of Australasia v. The Commonwealth Steamship Owners' Association*, (1913) 16 C.L.R., 664, the claimants were masters and officers of ships belonging to the respondent one of which *The Fiona* traded between Sydney and Fiji, from Fiji to Auckland, from Auckland to Fiji, then back to Sydney. Another ship, the *Wonganella* sailed from some port in Australia to Ocean Island or some other island of the Pacific Ocean and from there back to Sydney.

A dispute arose between the claimants' organization and the shipowners as to the rate of pay and conditions of employment on these outward and homeward voyages. The President stated the case for the opinion of the High Court on the following questions : " (1) Is there a dispute extending beyond the limits of any one State ? (2) If yes, can the Court impose duties to be observed on board the said ships outside Australia, are such duties enforceable by penalty whether by virtue of clause V. of the Constitution or otherwise ? "

In connection with this case consideration was given to the meaning of the expression in covering clause V. of the Constitution " first port of clearance " and " port of destination." The Court answered the first question by saying that by virtue of covering section V. a dispute is not the less a dispute extending beyond the limits of any one State merely because some of the operations in respect of which the dispute exists are performed extra-territorially. As to the third question the Court has power to require that any of the terms and conditions which it decides shall be in operation between the parties should be incorporated in a written agreement between them.

### **Intra-State and Coasting Trade.**

A plaint was brought by the Merchants Service Guild of Australasia against Allen Taylor, W. Holyman and other owners of ships, some engaged in inter-state trade and others engaged in intra-state and coasting trade. An award was made against them. Three of the respondent shipowners engaged in the intra-state and

coastal shipping trade of New South Wales, South Australia and Tasmania, respectively applied to the High Court for a prohibition on the ground that there could not in their cases be a single dispute extending beyond the limits of any one State because the coastal trade of one State was distinct from that of another. The High Court held that there might be a single industrial dispute embracing both inter-state and intra-state shipping. The Chief Justice (Sir SAMUEL GRIFFITH) said :—" The objection most strenuously insisted upon was that intra-state shipping is a different industry from extra-state or inter-state shipping so that there cannot be a single industrial dispute embracing both. I am unable to accept this contention. In the course of argument I instanced the case of two steamers belonging to the same owners lying in the port of Brisbane one of which is about to sail for the Gulf of Carpentaria, a distance of nearly 2,000 miles wholly in Queensland waters, while the other is about to sail to Sydney and Melbourne, a distance of 1,000 miles through New South Wales and Victorian waters. It seems to me obvious that if the masters and officers of such ships made common cause with respect to a matter affecting them in the same manner there might well be a single dispute extending beyond the limits of any one State " : *The King v. The Commonwealth Court of Conciliation and Arbitration* ; *Ex parte Allen Taylor and Others*, (1912) 15 C.L.R., at p. 601.

#### **Where Employees Deny Disputes.**

The President of the Commonwealth Court of Conciliation and Arbitration on the 23rd of October 1913 made an award on a plaint by the Merchant Service Guild of Australasia against the Newcastle and Hunters River Steamship Co. Ltd. and 127 other respondents which award was declared to be binding on certain specified employers including William Holyman & Sons Ltd. and 13 other employers who carried on business in Tasmania. On the hearing of the plaint after the evidence of both sides was closed, a statement signed by several of the employees stating that they had no dispute with their employers and were satisfied with their conditions of labour was tendered in evidence but was rejected as the claimants would not consent to its admission. An award was subsequently made which purported to bind the employers of these particular employees. The High Court granted a prohibition to prevent the enforcement of the award so far as it related to the employees who signed the statement, holding that it should have been admitted in evidence

by the President as it was tendered to prove that there was no industrial dispute within the jurisdiction of the Court so far as they were concerned : *The King v. President of the Commonwealth Court of Conciliation and Arbitration* ; *Ex parte Holyman & Son*, (1914) 18 C.L.R., at p. 273.

#### **Where no Inter-State Competition.**

There may be an industrial dispute " extending beyond the limits of any one State " although there is no inter-state competition in the products or services of the industry, and although the operations and conditions of the industry in one State have no direct action or re-action with respect to the operations or conditions in another State. On the evidence it was held that certain owners of ships which were engaged solely in trade on the coast of Tasmania were parties to an industrial dispute with the masters and officers of their ships which extended beyond the limit of that State ; and therefore that prohibition should not go in respect of an award by the President of the Commonwealth Court of Conciliation and Arbitration purporting to bind those owners : *The King v. President of the Commonwealth Court of Conciliation and Arbitration* ; *Ex parte Holyman & Sons*, (1914) 18 C.L.R., 274.

#### **No Artificial Criteria.**

The phrase " industrial disputes extending beyond the limits of any one State " in sub-section (xxxv.) of section 51 of the Constitution is to be construed according to the natural and ordinary meaning of the words as understood at the time of the passing of the Constitution Act. The word " dispute " means a real dispute in fact, and is not limited by any artificial criteria. The words " extending beyond the limits of any one State " as applied to a dispute means that the dispute is one " existing in two or more States " or in other words " covering Australian territory comprised within two or more States." *Per ISAACS, J. in The King v. The President of the Commonwealth Court of Conciliation and Arbitration* ; *Ex parte Holyman & Sons*, (1914) 18 C.L.R., at p. 285.

#### **Non-competing Industries.**

In the *Builders' Labourers' Case*, (1914) 18 C.L.R., 224, an application was made to the High Court on behalf of the employers for a prohibition to prevent the enforcement of an award made in the building trade, on the ground that there was no evidence of a

dispute extending beyond the limits of any one State ; that the building industry was of such a nature that there could not be any competition between the products of the industry in different States ; that the operations and conditions in one State could not have any direct action or re-action upon those in another State and that all possible questions as to conditions of work arising in connection with the trade were in every essence of a local character and that therefore, in respect of that industry there could not possibly be an industrial dispute extending beyond the limits of any one State. It was held by the majority of the Court, ISAACS, GAVAN DUFFY, POWERS and RICH, JJ. (GRIFFITH, C.J. and BARTON, J. dissenting), that the building trade is an industry in respect of which there may be an industrial dispute extending beyond the limits of any one State within the meaning of section 51 (xxxv.) of the Constitution, and that, on the evidence, such a dispute existed. The majority of the Court considered that an industrial dispute extending beyond the limits of any State is an industrial dispute which at a given moment exists in more than one State ; that is, has existence over an area which embraces territory of more than one State.: *The King v. The Commonwealth Court of Conciliation and Arbitration ; Ex parte Jones and Cooper*, (1914) 18 C.L.R., 225.

#### **Whether Several Disputes or one Dispute Extending.**

The main question is as to the existence of the industrial dispute extending beyond the limits of any one State. It has been the practice to separate the question into two parts ; the first being the existence of the dispute and the second its extension across State boundaries. In the *Builders' Labourers' Case*, 18 C.L.R., at p. 240, it was argued for the employers that there were several distinct disputes in other States which were merely brought together by the plaint but they were never voiced into one dispute but continued to retain their separate individuality. That process of separating the inquiry sometimes leads to confusion, but it is none the less essential. In each case it is necessary to remember and measure how much of the power over industrial disputes is granted to the Commonwealth ; how much is reserved for the State ? These inquiries need separate examination as raising a distinct and highly important question respecting the limitation of this power *inter se*, as it is termed ; that is, whether that is the true line of demarcation separating Commonwealth from State authority. And as in such a question the High Court subject to its own certificate



is absolutely the final tribunal, it behoves us to be specially careful of the conclusion at which we arrive. The line of demarcation between Federal and State powers is in question in each case. *Per* ISAACS, J., 18 C.L.R., at p. 240.

### **Test of Commonwealth Dispute.**

The problem is not whether the New South Wales dispute extended into Victoria and ultimately became a Victorian as well as a New South Wales dispute or whether the Victorian dispute extended into New South Wales and so added the latter State to itself, or whether either of these single State disputes gathered in South Australia, Queensland and Tasmania as an accretion. If the matter commenced simultaneously in several States it is obviously impossible to say that the dispute extended from any one of the States concerned into any other. "The truth is," said ISAACS, J., "that the question is inseparable. The industrial disputes referred to in the Constitution are disputes which at the given moment are seen to possess, besides their industrial quality, a certain indispensable character of extent. They are industrial disputes which at the moment do in fact extend beyond the limits of any one State. that is, which cover Australian territory that is not confined to the limits of any one State. They may originate in one part or several parts of the Commonwealth, just as a physical eruption may originate in one or several portions, of the body and spread, or they may originate—as in the present case—by a synchronous growth all over the area affected. Sub-section (xxxvii.) of section 51 is a useful instance of the word 'extend' in this sense. If a given industrial dispute answers the requisite geographical character, it is *ex vi termini* not a State dispute. It is, when considered in its integrity neither a single nor a multiple State dispute, nor a *fasciculus* of separate State disputes; it is an Australian dispute, and cognizable as such by the Commonwealth authority. It is, when regarded as an entity, as distinct from a State dispute or State disputes as inter-state commerce is distinct from the intra-State commerce of one or of several States. An inter-state commercial transaction, such as the carriage of goods across the border, is not a combination of two intra-state transactions of carriage, although it is transparent that, so far as relates to its own limits, each State could deal with the act of transit." *Per* ISAACS, J. in the *Builders' Labourers' Case*. 18 C.L.R., at p. 242.

**Competition of Industries not Necessary to Identity of Dispute.**

“ If, beyond this mutual industrial bond, anything further is needed by way of community of interest among the respective disputants on each side the employers have it in employing labour for the same class for industrial enterprise, and the employees have it in engaging in the same class of industrial enterprise. Again, the *Broken Hill Case*, 8 C.L.R., 419, is a precedent against the contention that competition between employers is a necessary element. There the employer in both States was the same company—making competition impossible ; but if, as I stated in the *Jumbunna Case*, the *nexus* of an industrial dispute is ‘ the industry ’ itself, that is, the means of satisfying public requirements over the given area, the identity of the employer in that case made it an ‘ *a fortiori* ’ example.” *Per ISAACS, J.*, in the *Builders’ Labourers’ Case*, 18 C.L.R., at p. 242.

**Limits Inter se.**

In the *Builders’ Labourers’ Case* the Court having refused the grant of prohibition for the enforcement of the award in its material parts, the employers appealed to the Privy Council against the decision of the High Court. No certificate had been given by the High Court permitting the appeal. The Commonwealth intervened and raised the point that such an appeal could not be made, as the question was one of the limits *inter se* of the constitutional powers within section 74 of the Constitution. For the appellants it was argued that it was not such a case, because although the extent of the Commonwealth powers was in question, there was no dispute as to State powers and therefore no question of the limits *inter se*. The Privy Council refused leave to appeal ; the ground of the decision was broadly that any extension of the Federal power necessarily restricted the area of the exclusive powers of the State because legislation within the extended area was liable to be over-ridden by Federal legislation. “ Their Lordships considered that the High Court decided, first, that the dispute before them was one extending beyond the limits of one State and second, that the President had jurisdiction to make his award under the legislation of the Commonwealth passed pursuant to their constitutional powers. The High Court decided that the frontier of the Commonwealth power reaches in this case into the State, and it, therefore, followed that the State had no exclusive, if any, power, in this case. This appeared to their Lordships to be a question as to the limits *inter se* of the several powers however much or little the Commonwealth may be required

to conform to State laws or State awards and however much or little the State may impose laws upon its own subjects": (1917 App. Cas., at p. 533.

#### **Arbitration Applied to Territories.**

The Seat of Government Administration Act, No. 25 of 1910, provides that the Commonwealth Conciliation and Arbitration Act (1904-1910) shall apply to industrial disputes in the Territory as if from the definition of "industrial disputes" in section 4 of that Act the words "extending beyond the limits of any one State," were omitted.

The Northern Territory Administration Act, No. 27 of 1910, provides that the Commonwealth Conciliation and Arbitration Act (1904-1910) shall apply to industrial disputes in the Territory as if from the definition of "industrial disputes" in section 4 of that Act the words "extending beyond the limits of any one State" were omitted.

#### **PROPOSED CONSTITUTIONAL AMENDMENTS OF THE INDUSTRIAL POWER.**

On 26th April, 1911, the following proposed amendments of section 51 (xxxv.) were submitted to the people of the Commonwealth by referendum :—

L.C. 51. (xxxv.) "Labour and employment, including :—

- (a) The wages and conditions of labour and employment in any trade, industry or calling, and
- (b) The prevention and settlement of industrial disputes in relation to employment on or about railways the property of any State."

This proposed amendment failed to secure constitutional ratification.

On 31st May, 1913, the following proposed amendments were submitted to the people by referendum :—

L.C. 51. (xxxv.) "Labour, employment, and unemployment, including :—

- (a) The terms and conditions of labour and employment in any trade, industry, occupation, or calling ;
- (b) The rights and obligations of employers and employees ;
- (c) strikes and lockouts ;
- (d) the maintenance of industrial peace ; and
- (e) the settlement of industrial disputes."

This proposed amendment failed to secure constitutional ratification.

On 31st May, 1913, the following proposed new sub-section to follow sub-section (xxxv.) was submitted to the people by referendum:—

“(51 (xxxa.)). Conciliation and arbitration for the prevention and settlement of industrial disputes in relation to employment in the railway service of a State.”

This proposed amendment failed to secure constitutional ratification.

### Objections Stated.

These proposed grants of power, if conferred, it is contended by the opponents, would give the Federal Parliament jurisdiction to pass laws dealing with labour and employment generally without any qualification or limitation; to legislate concerning all the conditions and incidents of labour and employment even to the minutest details in all the walks of life, professional, clerical, and industrial; in all the working institutions and establishments, private or public, throughout the Commonwealth where persons are employed or render service of any kind. It would enable the Federal Parliament not only to regulate the hours of labour and the rates of pay or remuneration in all trades, callings, occupations and professions; but would authorize the passing of laws, defining the legal relations of master and servant, employer and employee, master and apprentice, the liability of employers and employees for accidents happening or any neglect of duty by either one or the other.

The proposed amendments are unnecessary, too wide, too sweeping, and too comprehensive in form, to meet any of the alleged defects in the existing distribution of constitutional power.

It would be inconsistent with the Federal principle of the Constitution, and it would lead to unnecessary and unwarrantable Federal centralization by giving the Federal Parliament authority to deal with industrial matters of a purely local, domestic and provincial character, which might well be left to the State Parliaments.

Federal industrial intervention should only be permitted in controversies and industries of inter-state dimensions, or having Australian ramifications, and in which it is possible to formulate regulations and conditions of labour of a substantially uniform character.

The powers granted, it is feared, might be exercised by some temporary majorities in Parliament, not for the purpose of promoting industrial peace, or in the true interests of labour and capital, but in a way that might lead to unnecessary restraint of personal liberty, as, by the adoption of an absolute compulsory preference to unionists, and to the boycotting and persecution of those workers who decline to wear union badges.

The present Arbitration Court properly re-organized and decentralized will be quite capable of dealing with industrial disputes of inter-state importance without any constitutional change until some amendment on the lines suggested in the opposition resolution of October 1910 is accepted.

The proposed constitutional amendments would probably result in the destruction of the present useful and effective State Wages Boards, State Industrial Courts, and State Arbitration Courts, or, at any rate, there would be a constant risk of confusion and conflict between their determinations and Federal laws.

There is no country in the world, where industrial and humane legislation in the interests of the workers is so complete and effective, and where industrial grievances when brought to light are so swiftly removed by the force of public opinion or by the strong arm of State or Federal law, as in Australia.

It would be a fatal error in policy to encourage hopes which could never be realized, and to foment demands, or to render possible legislation of an extravagant and illusory character which, if carried, may destroy the whole fabric of Australian industry and enterprise, and result in a set-back and re-action to civilization and progress.

#### **Possible Improvements in the Exercise of Arbitration Power.**

Without an amendment of the Constitution it would be possible for the Federal Parliament to re-organize and improve the present method of exercising the conciliation and arbitration power. At present the jurisdiction is vested exclusively in one Court and in one Judge. It would be possible to decentralize the Court, so to speak, and instead of one Court, or in addition to one Court, which is at present over-worked and over-loaded with business, to have several industrial boards constructed on the wages' board plan, composed of representatives of employers and workers. Each industrial board to deal with such special cases or groups of cases as might be assigned

to it by law or by the President. The original Presidential Court might be preserved to entertain supervisory appeals from the several Boards on jurisdiction and other legal questions.

**Constitutional Amendments which might be Advised.**

The opponents of the present proposed amendments do not simply advocate a policy of negation ; they are quite prepared to consider suggested alterations of the Constitution justified by necessity and consistent with the Federal principle. These, in their opinion, are the two essential conditions of any constitutional change. During the debate in the House of Representatives on the first Referendum proposals in October 1910, the Opposition (Liberal) outlined its policy in the following Resolution which, however, was defeated. " That in the opinion of this House the industrial provisions of the Constitution should not be altered except to regulate the conditions of employment in all industries that are Federal in operation or which cannot be effectually regulated by any one State ; further enabling the Inter-State Commission to prevent and remove unfair competition between the same industries carried on in different States."

51. (xxxvi.) Matters in respect of which this Constitution makes provision until the Parliament otherwise<sup>91</sup> provides :

**§ 91. "UNTIL THE PARLIAMENT OTHERWISE PROVIDES."**

**LEGISLATION.**

The following Acts have been passed, superseding or replacing the preliminary provisions made by the Constitution " until the Parliament otherwise provides."

Const. Sec. 10.—The State electoral laws have ceased to apply to Senate elections, which since 1902 have been regulated by the Commonwealth law. Commonwealth Electoral Acts 1902-1911-1918.

Const. Sec. 24.—The mode of ascertaining the quota is determined by the Representation Act 1905, section 29 ; electoral divisions for the House of Representatives are provided for by the Commonwealth Electoral Act 1918, Part III.

Const. Sec. 30.—The qualification of electors of the Federal Parliament is fixed by the Franchise Act 1902.

Const. Sec. 31.—The State electoral laws have ceased to apply to the House of Representative elections, which since 1902 have been regulated by Commonwealth law : Commonwealth Electoral Acts 1902-1911-1918.

Const. Sec. 34.—The qualifications of candidates for the Federal Parliament are defined by the Commonwealth Electoral Act 1918. section 70, which prescribes an additional disqualification, viz. :—Membership of a State Parliament.

Const. Sec. 47.—Questions of disputed elections since 1902, and questions of qualifications and vacancies since 1907, are determined by the Court of Disputed Returns : Commonwealth Electoral Act 1918, Part XVIII.

Const. Sec. 48.—The mode of reckoning the allowances of members of Parliament was altered by the Parliamentary Allowances Act 1902, since repealed by the Parliamentary Allowances Act 1907 which increases the allowance to £600 a year.

Const. Sec. 73.—The conditions of and restrictions on appeals from the State Supreme Courts to the High Court are now regulated by the Judiciary Act 1903-1912, at p. 35.

Const. Sec. 87.—The “ Braddon clause ” was terminated by the Surplus Revenue Act 1908-1910.

Const. Sec. 97.—The audit of Commonwealth accounts is provided for by the Audit Act 1901-1912.

In connection with sections 10 and 31 of the Constitution, this paragraph confers on the Federal Parliament power to regulate Federal elections ; see *Smith v. Oldham*, (1912) 15 C.L.R., 355, at pp. 359, 362.

51. (XXXVII.) Matters referred to the Parliament of Commonwealth by the Parliament or Parliaments of any State or States, but so that the law shall extend only to States by whose Parliaments the matter is referred, or which afterwards adopt the law :

No matters have yet been referred to the Commonwealth Parliament by the States.

51. (xxxviii.) The exercise within the Commonwealth, at the request or with the concurrence of the Parliaments of all the States directly concerned, of any power which can at the establishment of this Constitution be exercised only by the Parliament of the United Kingdom or by the Federal Council of Australasia :

There has been no legislation under this sub-section.

51. (xxxix.) Matters incidental<sup>92</sup> to the execution of any power vested by this Constitution in the Parliament or in either House thereof, or in the Government of the Commonwealth, or in the Federal Judicature, or in any department or officer of the Commonwealth.

## § 92. "MATTERS INCIDENTAL."

### LEGISLATION.

The Acts Interpretation Act 1901-1916 which gives definitions of various terms and expressions in Commonwealth Acts of Parliament is a valid exercise of the power of Parliament as being incidental to the exercise of legislative powers within the meaning of section 51 of the Constitution.

The Amendments Incorporation Act 1905 which provides for the re-printing of Acts of the Federal Parliament with amendments embodied therein is incidental to the legislative power of Parliament under section 51.

The Commonwealth Public Service Act 1902-1917 deals with matters incidental to transferred departments under section 52 (ii.) and the appointment of civil servants under section 67 of the Constitution.



The High Court Procedure Act 1903-1915, Jury Exemption Act 1905, and Evidence Act 1905, are necessary and incidental to the exercise of the judicial power of the Commonwealth under sections 71 and 76.

The Secret Commissions Act 1905 prohibiting agents accepting secret commissions in commercial transactions is incidental to the legislative power of Parliament with respect to inter-state and external trade and commerce under section 51 (i.) of the Constitution.

The Maternity Allowance Act 1912 is incidental to the power of Parliament under sections 81 and 82 of the Constitution to make appropriations of public money for Commonwealth purposes.

The Meat Export Trade Commission Act 1914 deals with matters incidental to the external trade of the Commonwealth under section 51 (i.).

The Crimes Act 1914-1915 providing penalties for violations of Commonwealth laws is necessary and incidental to the legislative powers of Parliament under section 51.

The Australian Soldiers' Repatriation Act 1917 is incidental to the naval and military defence power contained in the Constitution, section 51 (vi.).

The Commonwealth Workmen's Compensation Act 1912 relates to matters incidental to the administration of the public service and the conditions of employment therein.

The Governor-General's Residences Act 1906 is incidental to section 3 of the Constitution.

The Commonwealth Salaries Act 1907 waiving the immunity of Commonwealth officers to State taxation comes within the implied powers of Parliament under the Constitution, clause V.

The Parliamentary Papers Act 1908 is incidental to the privileges of Parliament under section 49 of the Constitution.

The Statutory Declarations Act 1911 is incidental to the exercise of legislative power under section 51, and to the execution of power vested in departments and officers of the Commonwealth.

The Arbitration (Public Service) Act 1911 deals with matters incidental to the appointment, remuneration and duties of officers of public service under section 52 (ii.), section 67 and sections 81 and 82 of the Constitution.

The Commonwealth Conciliation and Arbitration Act, Part V., permitting the establishment of organizations as quasi corporations representing workers and employers in industrial disputes is valid as incidental to arbitration proceedings: *Jumbunna Coal Mine Case*, (1908) 6 C.L.R., at p. 320.

The Conciliation and Arbitration Act 1904-1915, section 6, prohibiting strikes and imposing penalties is valid being incidental to the exercise of the principal power, conciliation and arbitration: *Stemp v. Australian Glass Manufacturing Co. Ltd.*, (1917) 23 C.L.R., 226.

### Conducive or Helpful.

In *The King v. Kidman*, (1915) 20 C.L.R., 425, it was sought to sustain the view that "matters incidental" necessarily mean that the ancillary power exercised must be conducive or helpful to the enforcement of the principal power. This view was not accepted by the High Court. It was pointed out that the word used in the sub-section is "incidental" and not "conducive" and hence Parliament may legislate concerning any matter incidental to the execution of any power. The word "conducive" looks to some future result; incidental has no connotation of time. Expenses are "incidental" to the execution of the powers of the Commonwealth as to naval and military defence; they can hardly be said to be conducive to it. In the *Standard Dictionary* "incidental" is explained as meaning "occurring in the course of or coming as result or an adjunct or something else; concomitant as incidental expenses." Hence the Parliament may pass incidental laws which are retrospective in their operation. *Per HIGGINS, J.*, 20 C.L.R., at p. 453 and *per GAVAN DUFFY and RICH, JJ.*, at p. 455.

### Ancillary Power.

The Australian Industries Preservation Act, sections 5 (1), 8 (1), might have been sustained in the United States had they been, to use the words of CHASE, C.J., 9 Wall., 41, at p. 44:—"a necessary and proper means for carrying into execution some other power expressly granted or vested"—that is, some power other than the trade and commerce power—or, as he put it elsewhere in the same judgment, 9 Wall., 41, at p. 44:—"an appropriate and plainly adapted means" to that end. The Australian Constitution in section 51 (xxxix.) gives expressly a corresponding power as to

“ matters incidental to the execution of any power vested by this Constitution in the Parliament,” &c. The term “ incidental ” is at least as wide as the term “ necessary and proper.” Sub-section (XXXIX.) is no doubt made an express power for more abundant caution, although it would certainly have been implied in the absence of express bestowal. But before this legislation can be justified under that power, we must be satisfied that the State field of commerce has only been entered incidentally to the execution of the power granted by sub-section (xx.) (Corporations). That is to say, the primary object of the legislation must be, not the interference with the forbidden subject of State trade, but the control of the corporations the subject of the grant. If that were not so, the substantive power and the incident would be made to exchange places, an operation which no one will attempt to support as a valid exercise of power. *Per* BARTON, J. in *Huddart Parker & Co. Proprietary Ltd. v. Moorhead*, (1909) 8 C.L.R., 364.

#### **Limit of Application.**

In the common rule case arising under the Commonwealth Conciliation and Arbitration Act, section 38 (f), it was sought to support the legislation on another ground, namely, that it was incidental to the settlement of the dispute in respect of which the award was made. The view presented was that the Court could act under sub-section 38 (f) whenever it was found necessary for the effective settlement of the actual dispute. “ It is true ” (said Mr. Justice ISAACS) “ that the grant of a power carries with it the grant of all proper means not expressly prohibited to effectuate the power itself. No instance of this principle could be stronger than the case of the *Attorney-General for Canada v. Cain*, (1906) A.C., 542, where the Privy Council held that the legislative power to exclude aliens connoted the power to expel, as a necessary complement of the power of exclusion. But that was because the power of exclusion could not otherwise, even within its own admitted limits, be effectually exercised and enforced. The case is quite different when it is found that a given power, though fully and completely exercised and enforced, is not effectual to attain all the results desired or expected. The matter is then one for the consideration of the authority in whom resides the right of granting a power more extensive. It is not open to the grantee of the power actually bestowed to add to its efficacy, as it is called, by some further means outside the limits of the power conferred, for the

purpose of more effectively coping with the evils intended to be met. The authority must be taken as it is created, taken to the full, but not exceeded. In other words, in the absence of express statement to the contrary, you may complement, but you may not supplement a granted power. I therefore concur in the judgment of the Court." *Per* ISAACS, J. in the *Australian Boot Trade Employees' Federation v. Whybrow & Co.*, (1910) 11 C.L.R., at p. 338.

### Federal Jurisdiction in Matters of Criminal Law.

The scheme of the Constitution in the distribution of legislative power is to select certain subjects (38 in number) which are enumerated in section 51, most of which were originally within the ambit of the legislative powers of the federated Colonies and to confer on the Federal Parliament power to legislate with respect to them. These subjects do not in terms, as does the British North America Act, section 91, include the power to legislate with respect to criminal law.

How, then, can the passing of the Commonwealth Crimes Act, No. 12 of 1914, and the Amending Crimes Act, No. 6 of 1915, be explained and justified? This question was answered by the High Court in the case of *The King v. Kidman*, (1916) 20 C.L.R., 448.

Our Constitution, section 51, confers on the Federal Parliament power to make laws for the peace, order and good government of the Commonwealth "with respect to" a number of subjects specified; including (at the end of the list) "matters incidental to the execution of any power vested by this Constitution in the Parliament or in either House thereof, or in the Government of the Commonwealth, or in the Federal Judicature, or in any department or officer of the Commonwealth." The High Court was unanimous in holding that those words do no more than cover matters which are incidents in the exercise of some actually existing power conferred by Statute or by the common law. The imposition of such consequences, commonly spoken of as sanctions, which are generally in the form of penalties, is in the strictest sense of the term incidental to the execution of the power to make the law itself. With regard to matters incidental to the execution of powers vested in the Executive Government and in the Judicature, the express provisions of sub-section (xxxix.) may perhaps be necessary. But the meaning of the term 'incidental' is the same in all cases." *Per* GRIFFITH, C.J., 20 C.L.R., at p. 433.

"The question," said ISAACS, J., "depends entirely on the meaning of sub-section (xxxix.) of section 51 of the Constitution. The construction will probably be aided by first considering what is included in the words "any power vested by this Constitution in the Government of the Commonwealth." Whenever any such power is given, there is given with it by implication every ancillary power that is necessary to the existence of the government, and the proper exercise of the direct power it is intended to execute. Such ancillary powers must, in my opinion, be truly 'incident' to the main powers, in other words they must be impliedly included in the grant. That is how I understand the maxim *Quando lex aliquid concedit, concedere videtur et illud, sine quo res ipsa esse non potest*": 20 C.L.R., at p. 440.

"The legislative power must extend further than the limits of mere incidence implied by law. It must have, and by concession it has, power to attach punishment to conduct not already punishable. It may say that any attempted invasion by force on the field of Commonwealth executive powers may not only be resisted and prevented, but also punished. Punishment connotes, from what has already been said, something quite unnecessary to the existence or exercise of the executive functions. But it is nevertheless for legislative purposes within the term 'matters incidental to the execution' of the executive power. Punishment is an ordinary means employed by Legislatures to guard and assist the executive powers." *Per* ISAACS, J. in *The King v. Kidman*, 20 C.L.R., at pp. 440-441.

"I am, said Mr. Justice HIGGINS, "by no means prepared to admit that, apart from it Parliament has no power to make disobedience to any of its laws an offence punishable criminally, a power to make laws 'with respect to a given subject—say 'taxation'—is very wide in scope. It appears to me to be wider even than a 'power to levy and collect taxes' as in the United States Constitution."

"But," continued His Honor, "section 51 (xxxix.) seems to me to put beyond doubt the power of the Parliament to make laws as to frauds on the Commonwealth and for punishment of those who have been guilty of such frauds or have conspired to commit them": 20 C.L.R., at p. 450.

**Retroactive Laws.**

A retroactive or retrospective law, in the true sense, is one which " provides that as at a past date the law shall be taken to have been that which it was not." That does not include an act which only alters existing rights as from the date of the Act. No distinction can validly be drawn between such laws, whether they have civil or criminal consequences but the term *ex post facto* laws is generally applied to laws which, after the act, " is indifferent in itself " to use the words of Sir WILLIAM BLACKSTONE) " has been committed ; the person who committed it is declared by a law subsequently passed to have been guilty of a crime, and may be liable to punishment. Such laws are expressly forbidden by the Constitution of the United States and have been deprecated by public writers, but such laws are not forbidden by the Constitution of the Commonwealth " *Per ISAACS, J.*, 20 C.L.R., at p. 432.

In the case of *The King v. Kidman*, (1916) 20 C.L.R., 425, the question was definitely raised as to whether the Commonwealth Parliament had power to pass the Crimes Act (1915) and particularly section 3 which provides that the Act shall be deemed to have been in force from 29th October 1914.

The High Court held unanimously that the Act was valid ; but on different grounds. The Chief Justice (Sir SAMUEL GRIFFITH) upheld the Act on the ground that although the Commonwealth Parliament cannot enact a criminal law which can actually operate as an *ex post facto* law there is a common law of the Commonwealth applicable to the execution of its powers under which it is an offence to conspire to defraud the Commonwealth ; that the Parliament has power under section 51 (xxxix.) of the Constitution to embody the common law of the Commonwealth, an unwritten law of the Commonwealth, applicable to the execution of its powers, in the form of a declaratory Statute ; that an offence against such declaratory Statute is an offence against the law made by Parliament and that such a Statute so far as it refers to the Courts in which offences against the law so declared are to be prosecuted, is a law of procedure and therefore to be construed as retrospective in its operations. *Per GRIFFITH, C.J.*, 20 C.L.R., at p. 425.

The majority of the High Court, ISAACS, HIGGINS, GAVAN DUFFY and POWERS and RICH. JJ. upheld the retrospective section of the Act on the ground that within the limits as to subject matter

prescribed by the Constitution the power of Parliament to make laws is plenary, and includes the power within those limits to make *ex post facto* laws ; that the power conferred by section 51 (xxxix.) of the Constitution to make laws with respect to matters incidental to the execution of any of the powers therein mentioned is as plenary as any other of the powers to make laws ; and that the whole of the Crimes Act 1915 is a law with respect to matters incidental to the execution of one or more of those powers : 20 C.L.R., at pp. 425-426.

#### ROYAL COMMISSION ACT 1902-1912.

##### **Limited Scope of Inquiry Power.**

In 1911 the Government of the Commonwealth appointed a Royal Commission to inquire into the sugar industry in Australia, and in 1912 this Commission was re-appointed. One reason for the new appointment was that an amendment of the old Royal Commissions Act had been passed, and it was desired to make use of the powers which the amending Act conferred. The other reason was that the scope of the inquiry might be somewhat extended. The duty of the Royal Commission under the new appointment was to inquire into and report upon the sugar industry in Australia, and more particularly in reference to :—

- (a) Growers of sugar cane and beet ;
- (b) Manufactures of raw and refined sugar ;
- (c) Workers employed in the sugar industry ;
- (d) Purchasers and consumers of sugar ;
- (e) Costs, profits, wages and prices ;
- (f) The trade and commerce in sugar with other countries ;
- (g) The operation of the existing laws of the Commonwealth affecting the sugar industry ; and
- (h) Any Commonwealth legislation relating to the sugar industry which the Commonwealth thinks expedient.

Early in 1912 the secretary of the Royal Commission wrote to the Colonial Sugar Refining Company, enclosing a list of questions which the Commission proposed to address to the said Company, and intimating that these questions were not designed in any way to limit the scope of the inquiry.

He requested to be informed whether an officer of the Company would attend to answer the questions and give evidence and produce

documents called for, and intimated that it might be necessary to issue a formal subpoena to the directors and officers or some of them. Correspondence took place between the secretary and the Company's solicitors. The Company objected to many of the questions put, and declined to produce all of the documents called for. Summonses to compel attendance and to give evidence and produce documents were issued on behalf of the Commission, and these summonses having been heard in the Police Court at Sydney, fines were imposed.

The Colonial Sugar Refining Company ultimately commenced an action in the High Court against the Commissioners, the Attorney-General of the Commonwealth being subsequently added as a defendant. They claimed a declaration that the Royal Commissions Acts were *ultra vires* of the Commonwealth Parliament, and that the Company was consequently not bound to attend the meetings of the Commission or give evidence or produce documents ; and, alternatively, that they were not bound to answer any questions or produce any documents which related to a subject matter as to which the Commonwealth Parliament had no power to legislate, or which were not relevant to the terms of the Commission : *Colonial Sugar Refining Co. Ltd. v. Attorney-General (Commonwealth) and others*, (1912) 15 C.L.R., 182.

On the 4th October 1912 the Court, consisting of the Chief Justice, and BARTON, J. (ISAACS and HIGGINS, JJ. dissenting) made an interim order the effect of which was that the Company was not to be required to answer questions or produce documents relevant only to (1) the internal management of the affairs of the Company ; (2) the operations of the Company outside the Commonwealth, except so far as they related to the conditions of carrying on the sugar industry, irrespective of the persons by whom it was carried on ; (3) matters relating to the value of particular parts of the property of the plaintiff Company, except such parts as were actually and directly employed in the production of sugar within the Commonwealth ; (4) details of salaries paid to officers of the plaintiff Company, except so far as they were relevant to the actual cost of such production and management.

It was held by the High Court that the Colonial Sugar Refining Company was entitled to relief not on the ground of the invalidity of the Royal Commission Acts for the four learned Judges all took the view that these Acts were within the legislative powers of the



Commonwealth Parliament, but because, in the opinion of the Chief Justice and BARTON, J., an attempt was being made to exercise, under cover of these Acts, powers which were not and could not be conferred on them. It was held that the powers actually and validly so conferred did not extend to inquiry into the internal or domestic management of the affairs of a company created under State laws, and that it was only as to its operations in matters within the area of the Federal power that regulations could be validly made by the Commission. The two learned Judges whose opinion prevailed were of opinion that the power of the Commonwealth Government to hold an inquiry by commission exists only as incidental to powers presently vested in the Commonwealth by the Constitution, and that the mere fact that these powers might, by means of the machinery provided by the Constitution Act be extended to other subjects such as some into which the Commission had proposed to inquire, did not authorize inquiry into such subjects.

Mr. Justice ISAACS and Mr. Justice HIGGINS on the other hand were of opinion that the Commonwealth Parliament possessed the right to legislate for the purpose of obtaining information on existing matters which might form the subject of amendments to the Constitution. They based this conclusion on the construction of the Constitution Act itself. They were further of opinion that since, as the rest of the Court agreed with them in holding, the Royal Commission Acts were not *ultra vires*, it was impossible to pronounce in advance that the questions sought to be put might not prove relevant to matters which were held by all the Judges to be proper subjects of inquiry.

#### **Appeal to the Privy Council.**

It is only in exceptional cases that a question of this nature can be submitted to the King in Council. In the present case the High Court took the exceptional course of so certifying. The reason was that the four Judges of that Court who heard the case were equally divided and that under a statutory power, relating to cases in which that Court is exercising original jurisdiction, the decision was come to by the casting vote of the Chief Justice.

The appeal was brought by the Attorney-General of the Commonwealth and Professor Jethro Brown, the Chairman of the Royal Commission. The grounds of the appeal were that although the

High Court judgment had not declared the Royal Commission Act unconstitutional it had disallowed certain questions proposed to be put to the witness representing the Colonial Sugar Refinery Co. It was contended that as the Act had been declared valid by the Court the Commission could legally question witnesses as to the internal domestic management of the affairs of the Company created by State law. Two sections of the Constitution were relied on by the appellants in support of their contention. One being section 51 (xxxix.) relating to the incidental power of the Federal Parliament and the other being section 128 relating to the amendment of the Constitution.

In the result, the appellants, the Commission and the Commonwealth, suffered a greater defeat in the Privy Council than they had sustained in the High Court. In the High Court certain questions were disallowed whilst the Act itself was declared valid. In the Privy Council the whole of the Royal Commission legislation was declared to be unconstitutional and void.

#### **The Amending Power in Aid.**

It had been held by Mr. Justice ISAACS and Mr. Justice HIGGINS that the inquiries directed by the Commission might well be relevant to the question of the desirability of a change of the Constitution which might take place either under the express provision of section 128; by special legislation passed under certain conditions and approved after a referendum in the States; or possibly under sub-head xxxviii. of section 51, which enables the exercise by the Commonwealth, at the request or with the concurrence of the Parliaments of all the States directly concerned of any power which could at the establishment of the Constitution be exercised only by the Parliament of the United Kingdom or the Federal Council of Australia. But their Lordships thought that the answer to this argument given in the judgments of the Chief Justice and of Mr. Justice BARTON was conclusive. "No such power of changing the Constitution, and thereby bringing new subjects within the legislative authority of the Commonwealth Parliament, had been actually exercised, and until it had been it cannot be prayed in aid."

#### **Incidental Power to Aid Actual Legislation.**

Nor in their Lordships opinion "was the question carried further by sub-section (xxxix.) of section 51 of the Constitution which

declares to be within the legislative capacity of the Central Parliament "matters incidental" etc. "These words," said Lord HALDANE, L.C., "do not seem to do more than cover matters which are incidents in the exercise of some actual existing power, conferred by statute or by the common law."

#### **Federal Authority over Individuals.**

Their Lordships were of opinion that compulsion to answer some of the questions submitted to the witness for the corporation involve "a serious interference with liberty." Such problems as the following were raised:—To what extent could Federal laws be passed interfering with liberty? To what extent could the Royal Commission inquisitorial authority be based on the Federal incidental power? How and in what manner may that incidental power be exercised? Can there be a general and comprehensive exercise of the incidental power as in the Royal Commission legislation under review or must each exercise of the power be associated with or form part of some specific Act of Parliament within the legislative authority of the Commonwealth? On these points the judgment of the Privy Council is most interesting and important. Lord HALDANE, L.C., said:—"The authority over the individual sought to be established by the Royal Commission Acts, the new offences which they create, and the drastic powers which they confer, cannot, in their Lordships' opinion, be said to be incidental to any power at present existing by statute or at common law. A Royal commission has not, by the laws of England, any title to compel answers from witnesses, and such a title is therefore not incidental to the execution of its powers under the common law. And until the Commonwealth Parliament has entrusted the Royal commission with the statutory duty to inquire into a specific subject, legislation as to which has been, by the Federal Constitution of Australia assigned, to the Commonwealth Parliament, that Parliament cannot confer such powers as the Acts in question contain, on the footing that they are incidental to inquiries which it may some day direct."

That is to say their Lordships held that the incidental power to legislate authorizing inquiries respecting trade and commerce must be exercised by or in connection with or as a part of or incident of actual legislation relating to trade and commerce; that the principal power over trade and commerce being confined to inter-state and external transactions the ancillary power of inquiry would have to be limited and restricted to inter-state and external commerce

and that the Federal Parliament could not in the pretended exercise of authority over inter-state and external commerce direct an inquiry trenching on the sphere of the internal and domestic trade and commerce of a State. With reference to such matters as patents of course the Federal power is complete and absolute in all parts of the Commonwealth, free from any inter-State limitation or restriction. But it would appear that the incidental power to legislate authorizing inquiries respecting patents must be exercised by or in connection with or as part of an Act relating to patents. And so on through the whole range of legislative powers confided to the Commonwealth Parliament.

This seems to be the result of the judgment of the Privy Council. The Lord Chancellor, in continuing judgment, said:—"Having arrived at this conclusion, their Lordships do not think that the Royal Commissions Acts in the form in which they stand, could, without an amendment of the Constitution be brought within the powers of the Commonwealth Legislature. Their Lordships hesitate to differ from judges with the special knowledge of the Australian Constitution, which the learned Judges of the High Court, and not least, the Chief Justice and Mr. Justice BARTON, possess but the question they have to decide depends simply on the interpretation of the language of an Act of Parliament, and in the present case they have formed a definite opinion as to the interpretation which must be placed on the words used. Without re-drafting the Royal Commissions Acts and altering them into a measure with a different purpose, it is, in their Lordships opinion, impossible to use them as a justification for the steps which the Royal Commission on the Sugar Industry contemplates in order to make its inquiry effective. They think that these Acts were *ultra vires*, and void, so far as they purported to enable a Royal commission to compel answers generally to questions, or to order the production of documents, or otherwise to enforce compliance by the members of the public with its requisition." *Per* Lord HALDANE, L.C., (1914) App. Cas., at p. 237.

For further observations in this case see p. 190, *supra*.

## PROPOSED CONSTITUTIONAL AMENDMENT RELATING TO TRUSTS AND COMBINES.

On the 26th April, 1911, a proposal to add the following new sub-section to section 51 of the Constitution was submitted to the people by Referendum.

51 (XL). "Combinations and monopolies in relation to production, manufactures, or supply of goods or services."

This amendment failed to secure the necessary statutory majority. For particulars of voting, see *supra*, p. 21.

On the 31st May, 1913, the same proposed new sub-section was again submitted to the electors by Referendum and was again rejected, p. 22.

### **Present Commonwealth Powers.**

By its authority under section 51 (I.) to make laws with respect to "Trade and commerce between the States and with other countries," the Federal Parliament has full power to prohibit any trust or combine interfering with or restraining or monopolizing such trade and commerce. Its power over inter-state and external trade and commerce is as complete and absolute as the British Parliament can confer. The direct trade and commerce power carries with it a necessary and incidental power to prohibit any combination that would prevent or reduce the free flow of inter-state and external trade and commerce.

### **Trusts and Combines.**

The proposed new Federal power is not limited to the control of trusts and combines in trade and commerce, such as the buying and selling of goods. It is something more than that. It comprehends the production, manufacture and supply of goods, and the supply of services. There is no need for any such constitutional alteration; the Federal Parliament has at present an abundance of power to prohibit, suppress, and destroy trusts, combines and engaged in restraint of or to the detriment of Commonwealth trade and commerce.

During the term of the second DEAKIN Administration (1906) and the DEAKIN-COOK Administration (1909-1910), legislation known as the Australian Industries Preservation Acts was passed dealing

with the trusts, combines and monopolies. This legislation began with the Act of 1906 which is hereafter referred to as "the Anti-Trust Act" and it was followed up by Acts amending and improving it which were passed in 1907 and 1909, and a further one in 1910 during the term of the FISHER Labor Ministry.

### **Increased Stringency of the Law.**

In this legislation the onus of proving intent to restrain trade to the detriment of the public or to injure an industry, was cast on the Crown. In 1910, under Labor rule, an amendment of the Act was carried, with the concurrence of all parties, by which the accused is required to prove that a combine is not to the detriment of the public and that a restraint is not unreasonable.

### **Coal Vend Prosecution.**

The efficacy and constitutionality of this legislation was tested in the celebrated suit brought by the Attorney-General of the Commonwealth against certain coal proprietors in New South Wales, known as the Coal Vend, and certain shipping companies. The suit was ordered in 1909 whilst Mr. P. M. GLYNN was the Attorney-General of the DEAKIN-COOK Administration: *The King and the Attorney-General of the Commonwealth v. Associated Northern Collieries and Associated Steamship Companies*, (1911) 14 C.L.R., at p. 387.

It was an action against forty defendants, of whom sixteen were individuals, twenty-two were ordinary corporations, and two were commercial trusts.

The action was brought for several alleged violations of the Act between 24th September 1906, and 4th June 1910. The defendants consisted of two main groups, the colliery defendants and the shipping defendants. The first comprised all the proprietors of coal mines in the Newcastle and Maitland districts of New South Wales. The second comprised the inter-state shipping companies. The allegations against the defendants were that after the Act came into operation they entered into an express contract in relation to inter-state trade and commerce, with intent to restrain that trade and commerce to the detriment of the public: (1911) 14 C.L.R., 387.

It was alleged that the defendants monopolized, or attempted to monopolize; that they combined and conspired to monopolize

the trade and commerce in Maitland and Newcastle coal, with intent to control, to the detriment of the public, the supply and price of coal to persons engaged in the inter-state trade.

The alleged detriment to the public consisted in the practical abolition of competition in the sale of coal ; the excessive, arbitrary and capricious prices charged to consumers ; the restriction of their opportunities of choice ; difficulties in obtaining particular classes or grades of coal they desired ; and delays in obtaining deliveries of coal. The defence was, in effect, a denial of all that was alleged against the defendants.

### **The Vend Convicted.**

In the course of his judgment, Mr. Justice ISAACS said that he found, as a matter of fact, that coal under the Vend agreement could only be supplied by colliery proprietors to inter-state consumers through the intervention of the shipping companies ; that by the agreement the supply of coal was limited, and the price of coal was enhanced, and the public had to pay excessive prices, through which the defendants realized unreasonable profits. In very nearly every charge in that indictment against the defendants, His Honor found against them, and convicted them of the several offences proved. He said that the contract and combine between the defendants were in restraint of inter-state trade, interfered with its freedom, and tended to its monopoly.

In the result of this gigantic action, thirty-seven of the defendants were fined £500 each, aggregating £18,500, and they were further ordered to pay the costs of the action. It is estimated that the costs of the Crown alone will exceed £10,000, and the costs of the defendants cannot be much less. *Per ISAACS, J.*, 14 C.L.R., 387.

### **Appeal to High Court.**

The coal mine proprietors paid the penalties and costs awarded against them, but the shipping companies appealed to the High Court against the decision. The shipowners succeeded in upsetting the conviction but they succeeded only on the ground that the case against them had not been proved. The decision given by Mr. Justice ISAACS was not upset on the ground of the inadequacy of either the Constitution or the Federal Anti-Trust law.

One passage in the judgment of Mr. Justice ISAACS is particularly important :—" Defendants intended to efface competition in

*every form—competition of production*, which is only material here as bearing on the inter-state trade in the article when produced, and competition of carriage. They intended to grasp into one huge hand the whole inter-state supply of Newcastle coal.” This passage is quoted, to show that the Federal authority does extend to production and manufacture when there is such restriction as to interfere with the free flow of commerce between the States. The decision of Mr. Justice ISAACS was not reversed on that ground but on other grounds.

The High Court held that the vend agreement was a lawful and even a laudable transaction which was intended to operate and did operate to the advantage and not to the detriment of the public at large, notwithstanding that it was intended to operate and did operate to raise the price of coal.

The following passages from the judgment of the Chief Justice indicate the turning point of the case :—

“ We proceed, then, to consider whether an intention to cause detriment to the public should be inferred from the acts of the defendants consequent upon the agreement. The detriment primarily relied upon by the Crown is what is called an unreasonable increase in the price of coal in the inter-state market, and the suggested intent is an intent to obtain arbitrary and unreasonable prices for coal for the benefit of both the vend and the shipowners.”

. . . “ The first point made for the Crown is that the prices fixed by the vend for coal, f.o.b., for the year 1907 and following years were in fact unreasonable and exorbitant, from which we are asked to infer detriment to the public, and also a common intent to cause such detriment.” . . . “ We are bound to decide the case upon the evidence, and upon that evidence we are of opinion that the Crown has failed to prove any intent on the part of the appellants to cause detriment to the public. This disposes of the case as regards penalties. We are also of opinion that the Crown has failed to prove any actual detriment to the public. This disposes of the claim to an injunction under section 10 ” : *Adelaide S.S. Co. Ltd. (Appellant) v. The King and the Attorney-General of the Commonwealth (Respondent)*, (1912) 15 C.L.R., at p. 94, 96, 103.

### **Appeal to Privy Council.**

This decision was confirmed by the Privy Council on appeal, (1913) A.C., 781 ; (1914) Mews, at p. 39.



The Privy Council held that a contract is not an offence at common law, even if unenforceable, merely because it is in restraint of trade ; to make any such contract or combination unlawful it must amount to a criminal conspiracy. A contract in restraint of trade which is unenforceable at common law is not necessarily detrimental to the public within the meaning of the Australian Industries Preservation Acts, and the parties to such contracts will not be taken to have intended a detriment, either because they intended to limit competition, or to raise prices. An intention to charge excessive or unreasonable prices must be proved, and the onus of showing that any contract is calculated to raise prices to an unreasonable extent lies on the party alleging it. The appeal of the Commonwealth was dismissed.

#### **Efficacy of Anti-Trust Legislation.**

The then Attorney-General (Mr. W. M. HUGHES) doubted the efficacy of Federal legislation as it stood. In the experience of mankind through all ages of history it has been found that the only effective way known to Legislatures has been to prohibit wrongdoing, and if it be persisted in, to punish the wrong-doers. If, notwithstanding the prohibition, wrong is done, the wrong-doer should be punished with greater and increasing severity. Punishment is the necessary consequence of every infraction of the law, from the command, "Thou shalt not steal," right through the Decalogue. What more could any Act of legislation do, than is done by the Anti-Trust Act ? Its declaration is : "Thou shalt not combine in restraint of trade" : and it makes the penalty for the disregard of this prohibition £500 a day for a private individual, and £1,000 a day for a corporation ; and, if necessary, imprisonment of individuals may be imposed.

Attempts to minimize the effect of the Anti-Trust Act may be attributed to the desire to suggest some new-fangled remedy such as nationalization or socialism. The Federal Parliament has now no power to adopt such remedies, except in connection with Commonwealth services, and it may be that the minimizing of the value of Mr. Justice ISAACS' judgment is done to bolster up the demand for an amendment of the Constitution in that direction.

#### **Trusts and Combines within a State.**

It has been objected that trusts, combines and monopolies operating wholly within any one State are not interfered with by

the Anti-Trust Act. The reply is that the laws of the several States must deal with them. The Government and Legislature of Victoria are able to deal with the alleged brick combine, or any other combination in restraint of trade. If there were a serious grievance, and the Victorian Parliament did not remedy it, the people of the State would insist on something being done. To say that Commonwealth legislation is necessary is to reflect on the competence and willingness of the Governments and Parliaments of the States to legislate for the regulation and suppression of State trusts and monopolies carried on within their respective boundaries. No Upper House in Australia has ever rejected a Bill dealing with trusts, combines and monopolies. A great deal of what has been said about the brick combine and others is mere exaggeration—an attempt to create alarm.

### **Production of Goods.**

We now proceed to discuss the proposed extension of Federal power over trusts and combines engaged in the "production of goods." This expression is evidently quite wide enough to include all the primary industries yielding raw material, such as the pastoral, agricultural, horticultural, mining, fruit-growing, and dairying interests. Any agreement, understanding or custom regulating the mode, method, time, or place, or conditions or selling prices of raw materials the products of such industries, might be declared to be criminal conspiracy punishable by fine or imprisonment, whether such arrangement was detrimental to the public interests or not. This power is to be given without reference to any State boundaries and regardless of any question whether the production contemplated has any effect on inter-state or outside trade and commerce or whether the volume or flow of such trade and commerce is affected or not.

### **Manufacture of Goods.**

This expression is evidently intended to extend the Federal authority to secondary industries such as factories and establishments where labour is employed to convert or treat raw materials the products of primary industries such as wood, metal and machine works; food and drink supplies; clothing, textile fabrics, and fibrous material; books, paper, printing, and engraving; vehicles and fittings; saddlery and harness; ship-building and fittings furniture and bedding; bricks, chemicals and dye products; surgical and scientific appliances; time pieces, jewellery and plated

ware ; heat, light, and energy ; leather-ware, saddlery and harness ; wares and products not otherwise enumerated. This power is to be given without reference to any State boundaries and regardless of any question whether the manufacture contemplated has any effect on inter-state or outside trade and commerce or whether the volume and flow of such trade and commerce is increased or diminished.

#### **Federal Power over Production and Manufacture.**

At present the Federal Parliament has no control over production or manufacture within a State which has no relationship with external or inter-state trade : *Knight's Case*, (1894) 156 U.S. Rep 1. The Federal Parliament, however, has power to prevent restraint of, or monopoly of production and manufacture so far as it interferes with the flow or freedom of inter-state and external trade. *Pennsylvania Sugar Refining Company v. American Sugar Refining Company*, 166 Fed. Rep., at p. 254.

The last named Company was successfully prosecuted because it attempted, by controlling manufacture, to control the operations of a rival manufacturing Company by limiting the volume of exports from Pennsylvania to other parts of the United States of America.

That case shows that if a prosecution were instituted under similar circumstances against some of our Australian companies and the same facts were proved, the prosecution would in all probability be as successful in Australia as it was in America. It has thus been clearly established that if any contract goes beyond the limits of intra-state trade and controls the disposition of manufactured articles across State lines, it directly affects inter-state commerce and thus may contravene the Federal laws.

It is submitted that this limited and well balanced control over production and manufacture to the extent to which it affects inter-state and external trade, is quite sufficient and that there is no necessity for the proposed amendment giving the Federal Parliament control over production and manufacture in the general manner without reference to inter-state trade. If this power were granted, it would authorize the Federal Parliament to regulate every form of production and manufacture. The power being vested in the Commonwealth would practically be denied to the States. It would follow as the inevitable result that the duty would devolve on the

Federal Parliament to regulate all these delicate, multiform, and vital interests—interests which in their nature are and must be local in all the details of their successful management. . . . The demands of such supervision would require, not uniform legislation generally applicable throughout Australia, but a swarm of statutes only locally applicable and utterly inconsistent. Any movement towards the establishment of uniform rules of production in this vast continent, with its many different climates and opportunities, would only be at the sacrifice of the peculiar advantages of a large number of localities in it. See judgment of the Supreme Court of the United States in *Knight's Case*, (1894) 156 U.S. Rep. at p. 1.

### **Supply of Goods.**

These words are special and peculiar. Do they mean the buying of goods as well as the selling of goods? It is to be noted that the words "trade and commerce" are not used in connection with this proposed power. It does not say that the Federal Parliament shall deal with trusts, combines and monopolies in trade and commerce but "in the supply of goods."

The new power may be different from the ordinary trade and commerce power. If it means the same, why were different words used? If it means the same then there is no addition to the trade and commerce power except that it applies to the domestic trade and commerce of a State as well as to inter-state and external trade and commerce. It may be intended to apply only to the case of persons who do not produce or manufacture goods but who only buy and collect them, say in an emporium or market for re-sale. It is apparently not intended to regulate the buying of goods only but the selling of the same. This new form of words will lead to interminable misunderstandings and confusion in attempts to interpret them.

### **PROPOSED CONSTITUTIONAL AMENDMENTS RELATING TO MONOPOLIES.**

On 26th April 1911, the following proposed new section to follow section 51 of the Constitution was submitted to the people by Referendum.

" 51A When each House of the Parliament, in the same session, has by Resolution declared that the industry or business of producing or supplying any specified goods, or of supplying any specified services, is the subject of

a monopoly, the Parliament shall have power to make laws for carrying on the industry or business by or under the control of the Commonwealth, and acquiring for that purpose any property used in connexion with the industry or business on just terms "

This proposed amendment failed to secure constitutional ratification : *supra*, p. 21.

On 31st May 1913 the following proposed new section to follow section 51 was submitted to the people by Referendum :—

" 51A (1) When each House of the Parliament, in the same session, has by Resolution, passed by an absolute majority of its members, declared that the industry or business of producing, manufacturing, or supplying any specified services, is the subject of a monopoly, the Parliament shall have power to make laws for carrying on the industry or business by or under the control of the Commonwealth, and acquiring for that purpose on just terms any property used in connexion with the industry or business

" (2) This section shall not apply to any industry or business conducted or carried on by the Government of a State or any public authority constituted under a State "

This amendment failed to secure constitutional ratification : *supra*, p. 22.

### **Present Commonwealth Powers.**

The power of nationalizing industries is now possessed by the States. The Commonwealth can start industries in connection with the exercise of its enumerated powers, and for the purposes intended : as, for instance, under the power relating to defence, the manufacture of arms, ammunition, and other articles for the defence of the Commonwealth can be undertaken.

### **Proposed Alteration.**

The object of the proposed amendment is to enable the Federal Parliament to acquire any industry whatsoever carried on by private enterprise. Parliament is to be the sole judge of what is a monopoly. If each House of Parliament, in the same session, by a mere resolution, passed by an absolute majority of the members, declares an industry or business of producing, manufacturing, or supplying any specified goods or of supplying any specified services, is the subject of a monopoly, then Parliament can nationalize it.

It will be noticed on the face of the proposal that it is not restricted to any undertaking of a Federal, or Australian, or interstate character, but is applied to any occupation, or business, or

calling, or industry, for producing, manufacturing, or supplying services, regardless altogether of the magnitude or extent of the industry or business affected. It is not, therefore, intended to grapple with far-extending Australian monopolies. No such limitation is included in the proposal. The smallest and most insignificant alleged monopoly may be dealt with as well as services of the widest and most far-reaching character.

The next observation is that the proposed amendment is to be applied to the following cases, viz. :—

- (1) Any producing industry or business.
- (2) Any manufacturing industry or business.
- (3) Any industry or business supplying any specified services.

#### **Declaration of a Monopoly.**

Then the amendment provided that any business or industry of the foregoing descriptions whether engaged in primary production, secondary manufactures, or supplying services, may be declared monopoly on the two Houses of Parliament concurring; and when it is so declared to be a monopoly by the two Houses, Parliament may have power to make laws for the regulation of such industry or business, placing it under the control of the Commonwealth, and to acquire for such purpose any property used in connection with it.

“ Monopoly ” is the most important word in the whole clause; and there is no attempt at definition, it being apparently left to the absolute, unrestricted, arbitrary will of Parliament. There are no words of limitation showing whether such monopoly is intended to be such as may be to the detriment of the public, or whether it may include a beneficial monopoly.

#### **Vesting Business in the Commonwealth.**

The proposed amendment also gives power to vest such trade, calling, or business, either exclusively in the control or jurisdiction of the Commonwealth, or concurrently, and in competition with, private enterprise. It would probably be much better to take over a business altogether, rather than engage it in ruinous cut-throat competition. Where there is reserved, as an act of grace, the right to compete with the Government, the probabilities are that the Government will make the pace so hot and strong, and of such a cut-throat and ruinous character, that private enterprise

will soon be driven out of the field. So that, even if a concurrent right be reserved to the public, it will be a bare right, which, in all probability, will not long continue to be exercised.

### **General Effect of the Power.**

Taking the form and substance of the proposed constitutional amendment, it may be generally described as an attempt to enable the Commonwealth Government to become producers, traders, manufacturers, carriers, and purveyors of services generally in competition with, or to the exclusion of private enterprise.

### **Declaratory Power of Parliament.**

Objection is taken to the form of this grant of power, as one altogether out of place in a Federal Constitution, because of the absolute declaratory or interpreting authority which is vested in the Parliament. It is proposed to give Parliament, not only authority to exercise the power, but also to act as its own interpreter of the power; in that respect, of course, it violates the fundamental principle of our Constitution, and, indeed, of every other Federal Constitution.

In giving the two Houses declaratory or interpreting authority to say what constitutes a monopoly, we violate this federal principle of distribution. The effect whether intentional or otherwise, will be to grant to the Central Government more power than may be deemed necessary even by the advocates of the concession. The power, therefore, will lack certainty and definiteness, because the two Houses may hereafter concur in declaring some business, calling, or occupation connected with production or manufacturing, to be a monopoly, when, in truth and in fact, it may not be a monopoly, either in the common law definition, or the common-sense definition of the term.

### **Condition of Nationalization.**

According to the Bill, the only condition attached to the exercise of this power is that, in taking over the control of a business branded as a monopoly, any property used in connection therewith may be acquired on "just terms." The Commonwealth Government, in so taking over a business or calling from a private individual, firm, or corporation, are under no obligation to give equitable compensation for the loss of the business—for the good-will or the income—for the earning power of the business; all that the Government

have to do, is to give compensation for the bare loss of the property used in connection with the business. But this property may not be the most valuable asset ; there may be a large amount of capital used in connection with the business, but what the persons interested in the deprivation will suffer most, may be, not merely the loss of the visible property, but the loss of the good-will, the means of carrying on the trade, or the trade connection, and, above all, the opportunity to carry on a business which they expected to be able to carry on freely in a free country.

### **Loss of Freedom.**

If this amendment be at any time carried, Australia will no longer be a free country in which to carry on a business with the full assurance that there will be no such thing as confiscation possible at the hands of the Commonwealth. The most valuable business might be confiscated under the sham or pretence of giving compensation for a property, no compensation whatever being given for the loss of the business itself.

### **Limited Compensation.**

A business may have been built up by years of hard work, industry, and perseverance, or it may have been handed down from one generation to another in a family ; and yet it may be taken away without any compensation for the loss of any trade mark, trade right, or trade interest.

If this power were once vested in Parliament it would be held *in terrorem* over the whole of the business community of Australia engaged in every calling and occupation, whether producing, manufacturing, or service rendering. Business people would be under continual apprehension that when they had worked up their business to a high pitch of success the Commonwealth Government might pounce upon them at any time and call upon them to stand and deliver in the terms of this Bill.

### **Extension of Government Functions.**

The next objection to the proposals is that it seeks a grant of power in connection with trading, manufacturing, and service-rendering concerns, the exercise of which would exceed the true functions of the Federal Government. Governmental interference with private callings and private enterprise should be confined to



the regulation and control of private enterprise and industry, and should not be exercised to supersede or destroy them.

### **Power of State Parliaments.**

It cannot be urged that the State Parliaments have not the power to deal with most of the alleged monopolies. They have the power to deal with any class of trade or business coming within the meaning of public utilities, and which it might be advisable to convert into Government institutions.

The State Parliaments possess that power, and where it is necessary that it should be exercised, it may be exercised more judiciously by a State than by the Commonwealth Government. Because they could deal with the matter on a limited and judicious scale rather than on the wide, gigantic scale on which it is proposed to deal with such matters under the Bill of 1913.

### **The Purposes of Federation.**

So far as is necessary for the purpose of carrying out the true object and purposes of Federation, Parliament already possesses abundance of power under the Constitution as it stands. The whole history of Federation up to the present time shows that Parliament has been disposed to freely exercise, not only the direct grant of power conferred upon it under the Constitution, but also the powers incidental to the express and direct powers conferred upon it. If there were any defect in the Constitution as it stands, in the matter of the powers conferred on Parliament, there might be some justification for an amendment of the Constitution to increase the Federal powers.

### **REVOKED CONSTITUTIONAL REFERENDA.**

On the 15th July, 1915, on the advice of the FISHER (Labor) Government, the House of Representatives and the Senate passed a Bill for the submission to the electors of proposed laws to amend the Constitution in regard to the legislative powers of the Commonwealth Parliament. The proposed amendments differed somewhat from those submitted to the electors in the years 1911 and 1913.

### **Corporations.**

It was proposed to specifically exclude municipal and governmental corporations, from the proposed amendments of April 1911, and May, 1913.

**Industrial Matters.**

It was proposed to alter the former amendments by inserting words to read as follows :—" Including (a) Labour, (b) employment and unemployment, (c) the terms and conditions of labour and employment in any trade, industry, occupation, or calling, (d) the rights and obligations of employers and employees, (e) strikes and lock-outs, (f) the maintenance of industrial peace, (g) the settlement of industrial disputes."

**Railway Disputes.**

It was proposed to insert after paragraph (xxxv.) of section 51 the following paragraph :—(xxxv. (a) ) " Conciliation and arbitration for the prevention and settlement of industrial disputes in relation to employment in the railway service of a State."

**Trusts and Combines.**

It was proposed to alter the form of the proposed amendment, making it read as follows :—" (XL.) Trusts, combinations, monopolies, and arrangements in relation to (a) the production, manufacture, or supply of goods, or the supply of services, or (b) the ownership of the means of production, manufacture, or supply of goods, or supply of services."

**Monopolies.**

The former proposed amendment (p. 615) was altered by adding the following words :—" passed by an absolute majority of its members," and an additional sub-section was inserted to the effect that the section was not to apply to any industry or business conducted or carried on by the Government of a State, or any public authority constituted under a State.

An Act was passed to provide for compulsory voting in connection with the Referenda proposals to be submitted to the electors during the year 1915, declaring that it should be the duty of every elector residing within five miles of a polling place to record his vote at the Referenda to which the Act applied, and making non-compliance with the duty an offence punishable by a fine of £1. Owing, however, to the critical state of public affairs and the disturbed state of public opinion throughout the country, arising from the great European War, it was decided by the Labor Government of which Mr W. M. HUGHES was then Prime Minister to abandon the proposed

Referenda. Accordingly on the 15th November, 1915, an Act was passed providing for the withdrawal of writs issued by the Governor-General for the submission of the proposed laws to the electors.

**Exclusive Powers of the Parliament.**

52. The Parliament shall, subject to this Constitution, have exclusive power to make laws for the peace, order, and good government of the Commonwealth with respect to—

- (i.) The seat<sup>93</sup> of government of the Commonwealth, and all places<sup>94</sup> acquired by the Commonwealth for public purposes :
- (ii.) Matters relating to any department<sup>95</sup> of the public service the control of which is by this Constitution transferred to the Executive Government of the Commonwealth :
- (iii.) Other<sup>96</sup> matters declared by this Constitution to be within the exclusive power of the Parliament.

**§ 93. "SEAT OF GOVERNMENT."**

**LEGISLATION.**

SEAT OF GOVERNMENT ACT 1908.

SEAT OF GOVERNMENT ACCEPTANCE ACT 1909.

SEAT OF GOVERNMENT ADMINISTRATION ACT 1910.

See notes of section 125.

**§ 94. "PLACES ACQUIRED."**

**LEGISLATION.**

LAND ACQUISITION ACT 1906-1916.

It may be assumed that although this section refers to "places acquired" it comes within the meaning of the power granted by the Constitution, section 51 (xxxI.), "To acquire property for public purposes." See notes to section 51 (xxxI.) *supra*.

These words "places acquired for public purposes" are, with material variances evidently adopted from the United States' Constitution which empowers Congress to "exercise exclusive legislation" over the district which by cession and acceptance should become the seat of Government of the United States, and over "all places purchased by the consent of the Legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings." It has always been held that this provision vests the political jurisdiction and dominion in the union, so that such places are federal territory as well as federal property. But it has also been held that the provision only applies to places acquired with the consent of the State; and that where the United States acquire land by compulsory taking from a State or private owner, or by purchase from a private owner, the general jurisdiction of the State is not ousted. See *Fort Leavenworth R.R. Co. v. Lowe*, 114 U.S., 525; *Willoughby on the Constitution of the United States*, p. 378.

In the case of *R. v. Bamford*, (1901) 1 N.S.W. S.R., 337, the Supreme Court of New South Wales held that the post office, which had become vested in the Commonwealth under section 85 of the Constitution, was a "place acquired by the Commonwealth" within the meaning of this section, over which the Commonwealth had exclusive control and that the Parliament of New South Wales was excluded from legislative jurisdiction over the place. But a majority held that, by virtue of section 108 of the Constitution, the laws of New South Wales as existing at the date of the acquisition continued in force in the place until altered by Federal legislation, and that the administrative powers of the State and the jurisdiction of the State Courts continued in the same way, and therefore a conviction for stealing a letter from the post office contrary to State law was confirmed. STEPHENS, J. dissenting, thought that, on the American analogy, the whole political jurisdiction of the State was ousted and the conviction could not be sustained under State law.

It is submitted that the ground of this decision cannot be supported; and that land acquired by the Commonwealth, either under section 85 of the Constitution or under the power conferred by section 51 (xxx.) to acquire property for public purposes, does not

become Federal territory like the Seat of Government, and it does not cease to be territory of the State.

### **§ 95. "ANY DEPARTMENT TRANSFERRED."**

The provisions made by the Constitution for the transfer of certain State Government departments and services and the rights of transferred officers are not grouped together but are to be found in scattered sections. Section 52 (ii.) vests in the Commonwealth exclusive power of making laws for the decision of all matters relating to any department of the public service the control of which is transferred to the executive Government of the Commonwealth. Turning to section 69, under the heading "Transfer of certain departments," there is found a declaration that on a date or dates to be proclaimed by the Governor-General the departments of posts, telegraphs and telephones; naval and military defence; light-houses and lightships, and quarantine are to be transferred to the Commonwealth. But the departments of customs and excise in each State became vested in the Commonwealth on its establishment, 1st January 1901. The rights and privileges of transferred officers are preserved by the Constitution, section 84

### **New Departments.**

The Constitution, section 64, provides that the Governor-General may establish new departments of State and appoint officers to administer them.

### **Appointment and Removal of Civil Servants.**

Until Parliament otherwise provides by legislation, the Governor-General, on the advice of the Executive Council, has power to appoint and remove officers of the public service of the Commonwealth.

### **Transferred Departments.**

This paragraph provides that transferred departments shall be in the exclusive control of the Federal Parliament, but is silent as to new departments created by Parliament such as Home Affairs and Territories and Works and Railways. There can be no doubt, however, that the Commonwealth power prevails with reference to new departments and services created by Commonwealth laws. Such departments and services are necessarily Federal and exclusive from the nature of the case. *Per O'CONNOR, J., in Deakin v. Webb.* (1904) 1 C.L.R., at p. 596.

**§ 96. "OTHER MATTERS DECLARED TO BE EXCLUSIVE."**

Legislation under this head includes the Customs and Excise Tariffs, the Bounty Acts, and Acts relating to territories under the control of the Commonwealth. See notes to section 51, paragraphs (II.), (III.), *supra*, and section 122.

**Powers of the Houses in Respect of Legislation.**

53. Proposed<sup>97</sup> laws appropriating revenue or moneys, or imposing taxation, shall not originate<sup>98</sup> in the Senate. But a proposed law shall not be taken to appropriate revenue or moneys, or to impose taxation, by reason only of its containing provisions for the imposition or appropriation of fines or other pecuniary penalties, or for the demand or payment or appropriation of fees for licences, or fees for services under the proposed law.

The Senate may not amend<sup>99</sup> proposed laws imposing taxation, or proposed laws appropriating revenue or moneys for the ordinary annual services of the Government.

The Senate may not amend any proposed law so as to increase<sup>100</sup> any proposed charge or burden on the people.

The Senate may at any stage return to the House of Representatives any proposed law which the Senate may not amend,<sup>101</sup> requesting, by message,<sup>102</sup> the omission or amendment<sup>103</sup> of any items or provisions therein. And the House of Representatives may, if it thinks fit, make any of such omissions or amendments, with or without modifications.

Except as provided in this section, the Senate shall have equal power with the House of Representatives in respect of all proposed laws.

### § 97. "PROPOSED LAWS."

The Senate has, by the Constitution, equal powers with the House of Representatives except with respect to:—

(1) Proposed laws or bills appropriating revenue or money or imposing taxation cannot originate in the Senate; they must be introduced into the House of Representatives.

(2) It cannot amend any proposed laws or bills imposing taxation strictly so called.

(3) It cannot amend proposed laws or bills appropriating revenue or money for the ordinary annual service of the Government generally included in the Annual Appropriation Act.

(4) It cannot amend any proposed laws or bills such as Railway or Works Bills or Old Age Pension Bills so as to increase any proposed expenditure charge or burden on the people.

Whilst the Senate cannot amend any of these bills, it can, by a message to the House of Representatives, request the omission or alteration of any item or provision therein.

The term "proposed laws" in this section is in marked contrast to the word "laws" in section 55 of the Constitution. The change from "proposed laws" to "laws" is important and is fraught with significant consequences. Section 53 deals with and provides matters of order or procedure or regulation as between the two Houses of Parliament. It determines the constitutional relationship of the two Houses.

It is intended to mark and maintain the dignity, prestige and status of the House of Representatives as the National Chamber, the People's Chamber. The origination of supplies and taxation in that House is considered to be a vital point of practice and procedure founded on the privileges of the House of Commons. The denial of the right of the Senate to amend such bills is founded on the denial of the right of the House of Lords to do so in similar circumstances. In the case of the Senate, however, the practice has been compromised by allowing the Senate to suggest or request alterations in bills which it cannot actually make itself. These provisions relate to practice and procedure only, and even if they should be inadvertently lost sight of or intentionally waived by the House of Representatives, and even if such bills were to be passed, and

become law contrary to such mandates of the Constitution they would be law all the same notwithstanding the informalities. The mistake in such procedure would not affect the validity of the laws so passed. In case, however, of a violation of the provisions of section 55 of the Constitution, the results would be serious even if such bills passed both Houses and received the Royal assent, the defects appearing on their face they would be liable to be declared null and void to the extent declared by the Constitution.

“The Constitution in sections 53 and 54” said GRIFFITH, C.J. in the *Land Tax Case* “deals with ‘proposed laws’—that is, bills or projects of law still under consideration and not assented to—and they lay down rules to be observed with respect to proposed laws at that stage. Whatever obligations are imposed by these sections are directed to the Houses of Parliament whose conduct of their internal affairs is not subject to review by a Court of law.” *Per* GRIFFITH, C.J. in *Osborn v. The Commonwealth*, (1911) 12 C.L.R., at p. 336.

In the same case Sir EDMUND BARTON said:—“No lawyer, still less one who has any acquaintance with the practice of Parliaments, can doubt that in legislation a ‘proposed law’ is what is known as a bill, and a ‘law’ is what is known as an Act or Statute. The one is a *projet de loi*, not necessarily passed even by one House of Parliament, the other an actual law made effective by passage through both Houses, and by the Royal assent. Up to the moment of that assent there is only a proposed law or bill”: 12 C.L.R., at p. 352.

### § 98. “SHALL NOT ORIGINATE IN THE SENATE.”

In the session of 1907-1908 the Speaker (Sir FREDERICK HOLDER) ruled that the Commonwealth Salaries Bill, which had originated in the Senate and been sent to the House of Representatives for its concurrence, and which allowed the salaries of Commonwealth officers and the allowances of Federal members of Parliament to be subject to State income tax, was not a bill appropriating money or imposing taxation within the meaning of this section. Its effect was, he held, to bring these salaries and allowances within the ambit of State taxation, but it did not impose taxation by or for the Commonwealth Treasury. The Bill was, therefore, properly before the House (*Votes and Proc.*, 1907-1908, at p. 104).



**§ 99. "THE SENATE MAY NOT AMEND."****Tacked Clauses.**

In 1906 the question twice arose in the Senate whether, if a Tax Bill contained a section which violated the prohibition of section 55 against "tacking" the Senate had the right to protect itself against this violation of its rights by making amendments in or omitting the clause.

The Customs Tariff Bill (Agricultural Machinery), section 4, empowered the Governor-General to reduce the duty on imported machines if the prices charged for Australian made machines exceeded the prices fixed by the schedule to the Bill. The President (Sir RICHARD BAKER) ruled that the insertion of this clause in a Tax Bill was a violation of section 55, and that the Senate had power to amend the clause: *Sen. Journ.* 1906, pp. 174-175; *Parl. Deb.*, vol. xxxv., p. 5970.

At the next sitting of the Senate the President gave a similar ruling upon the proviso to section 2 of the Excise Tariff Bill (Agricultural Machinery), which exempted goods manufactured under certain conditions as to the remuneration of labour. On this occasion, however, the Senate dissented from the President's ruling *Sen. Journ.* 1906, p. 182; *Parl. Deb.*, vol. xxxv., pp. 6055-6090.

**§ 100. "SO AS TO INCREASE ANY PROPOSED CHARGE OR BURDEN."**

In 1903 the Senate made an amendment in the Sugar Bounty Bill which would have the effect of increasing the appropriation of money. The House of Representatives disagreed with the amendment, and returned the Bill to the Senate with a message stating, as the reason for disagreement, that the Bill was one appropriating money, and that the amendment would increase a proposed charge or burden on the people and it was therefore in violation of section 53 of the Constitution (*Votes and Proc.*, 1903, p. 55). The Senate then made its proposal in the form of a request, which was agreed to by the House of Representatives with a modification (*Votes and Proc.*, p. 68).

In 1908 the House of Representatives accepted some small amendments made in the Manufactures Encouragement Bill, which the Speaker (Sir FREDERICK HOLDER) pointed out would increase a

proposed charge or burden. The House, in its message to the Senate, said that the amendments were accepted in view of their insignificance, but that the matter was not to be drawn into a precedent: *Sen. Jour.* 1908, p. 126.

In 1909, the Chairman of Committees in the Senate ruled that an amendment in the Invalid and Old-Age Pensions Bill, the effect of which was to accelerate the reduction of the age at which a pension would become payable, was such as to increase a proposed charge or burden: *Sen. Journ.* 1909, p. 69.

### **Request Involving Increase of Charge.**

The Senate may not *make* an amendment in any bill which would increase a proposed charge or burden, but its right to *request* such an amendment has been conceded by the House of Representatives. The Sugar Bounty Bill 1903, in which such a right of request was admitted, was not a Bill "which the Senate may not amend." This involved an appropriation of money but not for the annual services of Government; so that instance establishes a precedent for a right of request not expressly granted by the Constitution; i.e., a right to request an amendment, which the Senate could not constitutionally *make*, in a Bill of which it had a general power of amendment.

In connection with the Customs Tariff 1908, the Speaker (Sir FREDERICK HOLDER) ruled that requests by the Senate that amendments should be made increasing the rates of duty might be taken into consideration by the House, and he pointed out that similar amendments had been accepted by the House on previous occasions: *Parl. Deb.*, vol. XLV., pp. 10484-10487.

### **§ 101. "WHICH THE SENATE MAY NOT AMEND."**

#### **Requests in other Bills.**

The power to request amendments, as expressed in this section, is limited to proposed laws "which the Senate may not amend" (i.e., Bills imposing taxation, and the ordinary annual Appropriation Bills). But the Senate has claimed a right, in Bills which it *may* amend (e.g. Bounty Bills and "extraordinary" Appropriation Bills), to *request* amendments which it may not make, such as amendments increasing a proposed charge or burden and the House of Representatives has conceded this right: *Parl. Deb.*, vol. 15, p. 2610, and vol. 39, p. 3481.

### § 104. "LAWS IMPOSING TAXATION."

#### **Interpretation Distinguished from Taxation.**

In the Court of Petty Sessions, Melbourne, Leah Abrahams was, in April 1902, prosecuted under the Commonwealth Customs Act 1901, sections 234 and 236, on a charge of being concerned in making a false declaration on 28th November 1901. She was convicted and fined £50 with £21 costs. The case came before the Supreme Court of Victoria on an order *nisi* to review the decision which was attacked on several grounds, *inter alia*, viz. :—that the Customs Act under which the conviction had been secured was, so far as it was applicable, invalid because it contained provisions contrary to the Constitution Act, section 55.

It was argued for the defendant that sections 138, 139, 140, 141 and 148 of the Customs Act imposed taxation, whilst other sections, including section 234 created offences with penalties annexed thereto. Defendant was prosecuted under section 234, one of the penal sections of the Act.

The Customs Act 1901 came into operation on 3rd October 1901. The Customs Tariff Act (1902) became law on 16th September 1902 and section 4 of that Act declared that it should be deemed to have come into operation on 8th October 1901. Section 2 of the Tariff Act provided that the Customs Act should be incorporated and read as one with it.

Upon the hearing of the order *nisi* before the Chief Justice (Sir JOHN MADDEN) arguments were submitted in support of the convictions to the effect that the sections of the Customs Act alleged to impose taxation were merely interpretations or provisions intended to give greater amplitude to the meaning of the provisions of the Tariff Act. Chief Justice MADDEN, however, refused to accept this view. He held that all the above quoted sections of the Customs Act were statutory impositions of taxation. "The consequence is" said the Chief Justice, "that all portions of the Customs Act except such as do impose taxation, and whether they are regarded as a separate enactment or as incorporated with the Tariff Act by its section 2 are of no effect and are void. Therefore section 234, under which this prosecution was instituted, is void. It is not a section which deals with the imposition of a tax only. It is a section intended to deter people from seeking to evade or cheat the customs

duties, or to prevent or embarrass their due collection. So also is section 236 void: Section 255 is also void and this case was conducted on the strength of it. So is section 183. The result is that the foundation of the information and of its prosecution fails, and the conviction is bad": *Stephens v. Abraham* (No. 1), 24 A.L.T., 185; 29 V.L.R., 201; 9 A.L.R., 79. The order *nisi* was made absolute and the conviction was quashed with costs.

Another test prosecution was instituted in the Court of Petty Sessions, Melbourne, against the same defendant for other offences against the sections 234 and 236 of the Commonwealth Customs Act. She was convicted and fined. An order *nisi* to review the decision was granted by Mr. Justice A'BECKETT. On return of the order it was referred to the Full Court which then had the opportunity of considering the decision of Chief Justice MADDEN in quashing the first conviction. In the result, the Full Court consisting of WILLIAMS, A'BECKETT and HOOD, JJ., held that none of the sections in part VIII. of the Customs Act 1901 impose taxation and that therefore the Act was not a law "imposing taxation" within the meaning of section 55 of the Constitution: *Stephens v. Abraham* (No. 2), 29 V.L.R., 229; 24 A.L.T., 216; 9 A.L.R., 89.

Mr. Justice WILLIAMS said:—"Looking at the Customs Act at the time it was passed, which as the Chief Justice says is the proper way to look at it, it was clearly not an Act imposing taxation. When the Tariff Act came into force subsequently, Part VIII. of the Customs Act, meanwhile suspended, came into operation. I think that, read with the Federal Tariff Act the provisions contained in Part VIII. of the Customs Act are merely declaratory, or for the purpose of interpretation or definition, or prescribing rules of denomination or machinery provisions for carrying out and enforcing the Tariff Act. These provisions in Part VIII. to which I refer, are evidently framed chiefly for the purpose of preventing the importation of goods in disguise or by devices so as to evade payment of duty on goods which they represent, or for which they are substitutes, or of which they form part."

### **Not Applicable to Territories.**

The limitations imposed by section 55 of the Constitution upon the making of laws imposing taxation apply only to such laws as are made for the government of the States under the power conferred by section 51 (II), and do not apply to laws made for the government of any territory acquired by the Commonwealth conferred by section 122, the two powers being independent of one

another. It has therefore been held by the High Court that the Northern Territory Acceptance Act 1910 and the Northern Territory (Administration) Act 1910, so far as by section 7 of the former Act and section 5 of the latter Act they purport to give effect, in the Northern Territory, as laws of the Commonwealth, to laws of South Australia which impose taxation, are valid as not being within the prohibition of section 55: *Buchanan and Another v. The Commonwealth and Another*, (1913) 16 C.L.R., 315.

### **Industrial Regulations not Taxation.**

The Excise Tariff Act 1906 (No. 16) is not an Act imposing duties of excise but is an Act to regulate the conditions of manufacture of agricultural implements, and is therefore not an exercise of the power of taxation conferred by the Constitution. Even if it were otherwise within the competence of the Commonwealth Parliament to deal with the conditions of labour, the Excise Tariff Act 1906 (No. 16), which, if valid, would have the effect of regulating the conditions of manufacture, would be invalid because it deals with matters other than duties of excise, contrary to section 55 of the Constitution: *The King v. Barger*, (1906) 6 C.L.R., 77.

### **Land Tax Legislation.**

In the case of *Osborne v. The Commonwealth*, (1911) 12 C.L.R., 321, the question was raised as to the validity of the Commonwealth Land Tax Act (1910) and the Land Tax Assessment Act (1910) which are to be read together. One objection taken, founded on section 55 of the Constitution, was that the Acts in question dealt with more than one subject of taxation and were therefore wholly void.

The Court held that the incorporation into the Land Tax Act 1910 by section 2 of that Act of the Land Tax Assessment Act 1910, which was not assented to until the following day, is effectual and that the Land Tax Act 1910 with that incorporation is in substance and in form an Act imposing taxation and not an Act to prevent the holding of large quantities of land by single persons. The Court also held that the Land Tax Assessment Act 1910 is not an Act imposing taxation within the meaning of section 55 of the Constitution, and that the Land Tax Act 1910 does not deal with any other subject of taxation than land, and does not in that respect infringe section 55 of the Constitution.

Mr. Justice O'CONNOR's judgment clearly summarised the constitutional view of section 55 :—" The taxation legislation, the subject of this special case," he said, " is contained in two Statutes, which, for the purpose of administration, must be read together. The Act first assented to, the Tax Act, is restricted to declaring the imposition of the tax and fixing the rate. The other Act, assented to on the day after, is the Assessment Act. Without its provisions no tax could be collected under the Tax Act, but of itself it imposes no tax. It is plain that the imposition of the tax is effected by the first Act, and that the other provisions of the second Act are directed merely to assessing the amount to be paid, and making it payable according to the assessment."

" The object of section 55 of the Constitution is to secure that each enactment imposing taxation shall be framed in a certain form. The frame of the enactment is important only for reasons of parliamentary procedure. The section is in the middle of a group of sections dealing with the legislative powers of the Senate and House of Representatives, and with the Governor's assent to proposed laws; their reservation and disallowance. Every section of the group relating to parliamentary procedure is directed to preserving the privileges of the House of Representatives with respect to appropriating moneys and imposing taxation, and to safeguarding the Senate from abuse of those privileges by the House of Representatives. To that end it provides that proposed laws which the Senate are forbidden to amend shall be framed in the manner prescribed."

" In enacting section 55," continued Mr. Justice O'CONNOR, " the framers of the Constitution have given the Court jurisdiction to examine the frame of a law. Section 55 may be applied to each piece of legislation as it becomes law, just as either House would apply the provisions of sections 53 and 54 of the Constitution to proposed laws as they came before them. Immediately a proposed law becomes a law, it is subject to examination in the light of section 55. If it is framed in accordance with that section, it is valid. Judged separately on these principles neither the Tax Act nor the Assessment Act is open to the objections taken. The former, which is a law imposing taxation, clearly deals with one subject of taxation only—that is land—the latter, though dealing with taxation, does not, as I have pointed out, impose taxation, and is therefore not within the section. Considering both Acts together, to ascertain

the intention of the Legislature, it is quite clear that Parliament intended to impose taxation by the Tax Act and not by the Assessment Act, and that it framed the latter expressly in the form which did not impose taxation so that it might be open to amendment by the Senate. Assume, however, that the Acts may be read together, as the plaintiff contends, and that the Assessment Act is a law imposing taxation, the objection must still fail on another ground, namely, that in none of its provisions does the Act deal with any other subject of taxation than land." *Per O'CONNOR, J.*, High Court judgment, (1911) 12 C.L.R., 355.

### § 105. "ONE SUBJECT OF TAXATION ONLY."

#### **Taxation of Land and Personality.**

The Commonwealth Land Tax Act 1910-1912, section 39, provided that all land owned by a company shall be deemed to be owned by the shareholders of a company as joint owners in the proportions of their interests in the paid up capital of the company, with the same consequences as to liability to taxation in respect of their respective interests as in other cases of joint ownership. In *Morgan v. Deputy Federal Commissioner of Land Tax, N.S.W.*, (1912) 15 C.L.R., 667, objection was taken that assuming the object of taxation was land, and the members of the joint stock company were not the owners of land and that a law requiring persons not the owners of land to pay tax in respect of it is not, as to them a law imposing land tax, but a tax on personality and that section 39 is therefore obnoxious to the provisions of section 55 of the Constitution. It was pointed out that Parliament had proceeded upon the assumption that the members of a company owning land are in substance the beneficial owners of the land in proportion to their interests in the paid up capital of the company. It was held by the High Court that the Federal Parliament in selecting subjects of taxation is entitled to take things as it finds them, in *rerum natura*, irrespective of any positive laws of the States prescribing rules to be observed with regard to the acquisition or devolution of a formal title to property or the institution of judicial proceedings with respect to it.

#### **Double Taxation.**

In the case of *The Attorney-General of Queensland v. The Attorney-General of the Commonwealth*, (1915) 20 C.L.R., at p. 164, the validity of the Federal Land Tax Assessment Act 1910-1914

was again impeached on the ground that it offends against section 55 of the Constitution by dealing with more than one subject of taxation, viz. :—To tax land as well as personality ; that by sections 34-39 it imposed a tax on members of the joint stock company in respect of their shares or interests in the Company. The High Court declined to reverse its decision in *Morgan's Case*, 15 C.L.R., 661, which it had been invited to review.

#### Recommendation of Money Votes.

56. A vote, resolution, or proposed law for the appropriation of revenue or moneys shall not be passed unless the purpose of the appropriation has in the same session been recommended by message of the Governor-General to the House in which the proposal originated.

#### Disagreement Between the Houses.

57. If the House of Representatives passes any proposed law, and the Senate rejects<sup>108</sup> or fails to pass it, or passes it with amendments to which the House of Representatives will not agree, and if after an interval of three months the House of Representatives, in the same or the next session, again passes the proposed law with or without any amendments which have been made, suggested, or agreed to by the Senate, and the Senate rejects or fails to pass it, or passes it with amendments to which the House of Representatives will not agree, the Governor-General may dissolve the Senate and the House of Representatives simultaneously. But such dissolution shall not take place within six months before the date of the expiry of the House of Representatives by effluxion of time.

If after such dissolution the House of Representatives again passes the proposed law, with or without any amendments which have been made, suggested, or agreed to by the Senate, and the Senate rejects or fails to pass it, or passes it with amendments to which the



House of Representatives will not agree, the Governor-General may convene a joint sitting of the members of the Senate and of the House of Representatives.

The members present at the joint sitting may deliberate and shall vote together upon the proposed law as last proposed by the House of Representatives, and upon amendments, if any, which have been made therein by one House and not agreed to by the other, and any such amendments which are affirmed by an absolute majority of the total number of the members of the Senate and House of Representatives shall be taken to have been carried, and if the proposed law, with the amendments, if any, so carried is affirmed by an absolute majority of the total number of the members of the Senate and House of Representatives, it shall be taken to have been duly passed by both Houses of the Parliament, and shall be presented to the Governor-General for the Queen's assent.

**§ 106. "IF THE SENATE REJECTS."**

At the general election held in May, 1913, the Labor party majority of ten in the previous House of Representatives was turned into a minority of one in the new House, although at the same time, the Labor party in the Senate was strengthened and placed in a position of overwhelming superiority in point of numbers. The Prime Minister, Mr. A. FISHER, having resigned, Mr. JOSEPH COOK was summoned by the Governor-General, Lord DENMAN, to form a ministry, which he accordingly did after pointing out all the difficulties in the way of governing the country.

Upon the new House being sworn in on 9th June 1913, the retiring speaker, Mr. CHARLES McDONALD declined to continue in the chair, and the retiring Chairman of Committees, Mr. POYNTON, also refused to be re-elected. The incoming Ministry were obliged to find occupants for these positions which resulted in their loss of the majority of one in the House in which they then had only equal number with those of their opponents. Had Mr.

McDONALD remained in the chair, they would have had a majority of two with which to carry on the business of the country.

Notwithstanding this precarious position the Ministry persevered in their efforts to do business. They introduced a general amending Electoral Bill for the purpose of rectifying defects in the electoral machinery and restoring the provisions for postal voting. Other proposals of a non-party character were introduced, such as the Agricultural Bureau Bill. At the end of two months' sitting, no business of any kind was done in the House of Representatives, whilst in the Senate control of affairs was completely taken out of the hands of responsible Ministers.

When it became clear to the Government that no useful business could be done, they decided that a further appeal to the people should be made by means of a double dissolution, under section 57 of the Constitution, and accordingly they endeavoured to force through the House of Representatives two short measures for the purpose of fulfilling the terms of the Constitution, one of these measures being "Government Preference Prohibition Bill," to abolish preference to unionists in the Government service.

The design and intention of the Ministry was well understood by Parliament and the country. There was no secret or subterfuge in the procedure adopted. After a long and bitter struggle the Preference Abolition Bill was carried through the House of Representatives and was sent to the Senate where it was rejected. After an interval of three months it was again passed by the House of Representatives, sent to the Senate, for a second time it was rejected by the Senate.

On the 4th of June, 1914, Mr. (afterwards Sir) JOSEPH COOK sent a brief memorandum to the Governor-General as follows:—

"Mr. Cook presents his humble duty to His Excellency the Governor-General, and advises him, in accordance with the provisions of clause 57 of the Constitution, to dissolve simultaneously the Senate and the House of Representatives. The provisions of clause 57 of the Constitution have been completely complied with in respect of a Bill ('The Government Preference Prohibition Bill'), which has twice passed the House of Representatives, and which has been twice rejected by the Senate.

"The almost equal numbers of the two parties in the House of Representatives, and the small number supporting the Government

in the Senate, render it impossible to manage efficiently the public business." 4/6/14.

Later on the same day Mr. COOK sent a more comprehensive memorandum to His Excellency, setting forth the history of the controversy between the two Houses and the grounds upon which he based his recommendations.

On the same day the Governor-General sent the following memorandum to the Prime Minister :—

“ Commonwealth of Australia,  
Governor-General, 4/6/14.

Referring to the Prime Minister's memorandum of this date, the Governor-General desires to inform the Prime Minister that he gives him permission to inform Parliament of the Governor-General's decision to dissolve both Houses, and to prorogue Parliament as soon as adequate financial provision is made to carry on the Public Service in all its branches for a period sufficient to cover the elections.”

It was generally admitted that neither party could, under existing conditions, carry on the government of the country. It had been urged that the proper remedy was the dissolution of the House of Representatives and not a dissolution of both Houses. Mr. COOK combatted his contention by pointing out that a single dissolution could not relieve the existing situation as however much the Liberal majority in the House of Representatives might be increased as the result of a fresh single election, it would still have the same Senate to deal with, in which the Labour party had a preponderating majority, sufficiently strong to make the parliamentary machine unworkable.

It was argued by the Government that the power vested in the Governor-General by clause 57 of the Constitution to dissolve the Senate and the House of Representatives simultaneously in the conditions therein set out is one in the exercise of which he should, according to constitutional principles, be guided by the advice of Ministers possessing the confidence of the House of Representatives.

On the face of the Constitution, it was a clear provision that, in a specified event, a specified remedy is available. The object of the remedy was to decide between the National House and the

House representing the States. The remedy was an appeal to the electors of both Houses ; and if the result of that appeal was not decisive, an appeal to the newly-elected representatives of both groups of electors, in joint sitting.

The power to grant the double dissolution, and the power to summon the joint sitting, were both vested in the Governor-General by the same section of the Constitution. It was not reasonable to suppose that the framers of the Constitution intended to place the responsibility of granting or refusing a double dissolution upon the Governor-General personally—to place him in the invidious position of appearing to take sides with one House or the other, or with one political party or the other. It was reasonable to suppose that they intended the Governor-General to accept in this issue the advice of Ministers who represented the majority in the House which, by the Constitution, is given the origination of supplies and the right to challenge the decision of the other Chamber.

Again, according to the scheme of section 57, the double dissolution was a stage in the sequence of events of which the joint sitting is the culmination. It was inconceivable that, after a double dissolution, the Governor-General would ever refuse the advice of his Ministers to call a joint sitting ? It was equally inconceivable that it could ever have been intended that the Governor-General should, in his personal discretion, refuse the opportunity for the first stage of the appeal.

The considerations guiding the Governor-General in deciding on the advice given, to grant a double dissolution, were necessarily quite different from those which generally arise in connection with a ministerial crisis, resulting from defeat in the popular Chamber followed by the defeated Ministry applying for a dissolution of that Chamber. Reference has already been made, *supra*, p. 233, to the constitutional rules which guide the Representative of the Crown in granting or refusing a single dissolution. These rules cannot possibly apply to such an extraordinary statutory occasion as that which arises under section 57 of the Commonwealth Constitution, where all the provisions of that clause have been completely complied with, eventuating in responsible advice to dissolve simultaneously the Senate and the House of Representatives. This section of the Constitution of the Commonwealth is one without example or precedent in any other Constitution. It was designed and adopted

by the Federal Convention, not as a means of settling party disputes or party conflicts in the popular Chamber, but as a means of settling deadlocks between the National Chamber and the Senate. The section provides a distinct scheme and plan detailing successive steps and stages in any particular conflict between the two Houses, and defining in advance the developments which must take place in order to bring the dormant power of a double dissolution into action. The first step is the selection of a test measure to be introduced into the House of Representatives, its passage through that Chamber, and its transmission to the other. If it is rejected there must be an interval of three months in the same or succeeding session. After the required interval the same measure must be again introduced in the originating House, again passed and again sent to the other Chamber. If it is rejected the second time then the conditions arise which eventually justify the advice of both Houses to be dissolved. Assuming the advice is accepted a dissolution of both Chambers follows and a general election takes place. If the administration which has caused a double dissolution is returned triumphantly at the polls, Parliament is convened and the same Bill is re-introduced, passed and sent to the resisting Chamber. If the Bill is rejected by the Senate a third time, provision is made for a joint sitting of both Houses.

It will be seen, therefore, that a double dissolution is but one step or stage in the process of settling deadlocks between the two Houses. Of course if the Ministry which has advised a double dissolution is defeated at the polls, controversy is for the time being terminated, and the resisting Chamber achieves a triumph. This is exactly what happened in connection with the double dissolution on the Government Preference Prohibition Bill. A general election of both Houses was held in September 1914. It resulted in the complete and overwhelming defeat of the COOK Ministry and the Liberal party. The Labor party succeeded in returning large majorities both in the Senate and the House of Representatives, and as a consequence the COOK Ministry resigned and Mr. FISHER formed a second Labour Administration.

This precedent is useful and important as showing that when once a conflict between the Senate and the House of Representatives is challenged and accepted with a view to bringing the provisions of section 57 of the Constitution into operation the campaign proceeds

in successive stages, and it follows that when a Ministry has complied with the requirements of the Constitution, they have the right to advise and to expect the Governor-General to dissolve both Houses simultaneously. It is as well that such a view of the constitutional power should be understood and appreciated by all parties so that when the challenge has been delivered and accepted, both Houses should take warning that it is a serious and an important procedure which will result in either victory or disaster to one side or the other. It is not an experiment or a reconnaissance that can be lightly indulged in. The section may be used as a two-edged sword. It may smite the attacking party as well as the resisting party. Neither party and neither House should rely upon the Governor-General to shield them by a refusal to act on the advice of his Ministers. The Governor-General has little, if any, discretion left in such a great crisis and it is not likely that he would run the risk of refusing to follow the advice of a Ministry having command of supplies in the National Chamber, and of refusing to act on what appears to be an implied, if not an expressed mandate of the Constitution.

It is true that the section says that the Governor-General "may" dissolve, but in construing other Acts of Parliament in which the word "may" occurs it has often been held to have a mandatory signification. The word "may" is a mannerly method of indicating the duty of a representative of the King.

The power of a double dissolution is one of the reserve powers of the Constitution and should only be resorted to on great and urgent occasions involving momentous issues of legislative policy.

The result of the appeal to the country on this occasion shows the force of this warning. The question of preference to unionists was a party question and not one of national importance or national significance, justifying a resort to such a critical and dangerous appeal. The Liberals, on this occasion, staked all and lost. It is not likely that this reserve power will be frequently resorted to in the future. The stake is too serious.

#### Royal Assent to Bills.

58. When a proposed law passed by both Houses of the Parliament is presented to the Governor-General for the Queen's assent, he shall declare, according to

his discretion, but subject to this Constitution, that he assents in the Queen's name, or that he withholds assent, or that he reserves the law for the Queen's pleasure.

**Recommendations by Governor-General.**

The Governor-General may return to the House in which it originated any proposed law so presented to him, and may transmit therewith any amendments which he may recommend, and the Houses may deal with the recommendation.

**Disallowance by the Queen.**

59. The Queen may disallow any law within one year from the Governor-General's assent, and such disallowance on being made known by the Governor-General by speech or message to each of the Houses of the Parliament, or by Proclamation, shall annul the law from the day when the disallowance is so made known.

**Signification of Queen's Pleasure on Bills Reserved.**

60. A proposed law reserved<sup>107</sup> for the Queen's pleasure shall not have any force unless and until within two years from the day on which it was presented to the Governor-General for the Queen's assent the Governor-General makes known, by speech or message to each of the Houses of the Parliament, or by Proclamation, that it has received the Queen's assent.

**§ 107. "PROPOSED LAW RESERVED."**

The only important proposed laws reserved under this section for the Royal assent have been the Customs Tariff Bill (British Preference) 1906, which was not assented to by the Crown, and the Navigation Bill 1912. This Bill was so reserved in conformity with an understanding with the Imperial Government as it was thought that Imperial interests might be involved. The Royal assent was announced by proclamation on 17th October, 1913.

## CHAPTER II.—THE EXECUTIVE GOVERNMENT.

## Executive Power.

61. The executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen's representative, and extends to the execution<sup>108</sup> and maintenance of this Constitution, and of the laws of the Commonwealth.

## § 108. "EXECUTION AND MAINTENANCE."

## Executive Power.

In the case of *Huddart Parker & Co. Proprietary Ltd. v. Moorehead*, (1909) 8 C.L.R., 330, attention was drawn to the fact that, by section 101 of the Constitution, the Inter-State Commission is endowed with such powers of adjudication and administration as the Parliament deems necessary for the execution and maintenance, within the Commonwealth, of the provisions of this Constitution relating to trade and commerce, and of all laws made thereunder."

The question was raised to what extent, if any, this grant of power to the Commission involved a withdrawal of power from the Executive Government. The validity of section 15B of the Australian Industries Preservation Act was questioned on the ground that it vested in the Comptroller-General of Customs authority which under section 101 of the Constitution could only be vested in the Inter-State Commission. The High Court held that the power of inquiry vested in the Comptroller-General was not one of the matters entrusted to the Inter-State Commission, and that the execution and maintenance of the trade and commerce laws was not in abeyance till the Commission was established.

Mr. Justice ISAACS said (at p. 387):—"It is hard to perceive the limit of the operation of such a contention. Ministerial control and to a great extent judicial action, would be entirely superseded, in the ordinary operation of government by a body entirely independent of the Executive, and not responsible to Parliament, and not necessarily trained in the law. Its duties could not be fulfilled without an immense staff all over Australia operating side by side with, but altogether separate from, the regular members of the public service. I am quite unable to accept this view of the section. If for any reason Parliament thought it desirable to invest the



Inter-State Commission when created with the duties of inquiry under the Australian Industries Preservation Act, it could certainly do so, but I cannot agree that the only alternative to this is executive paralysis in regard to all the trade and commerce provisions established by the Constitution or enacted by the Legislature. And yet that extraordinary position is essential to this branch of the appellants' argument."

It was also contended in the same case that this power of inquiry, being in the nature of compulsory discovery in aid of criminal proceedings, was essentially judicial, and could not be vested in an executive officer (see section 71 of the Constitution); being analogous to the examination of witnesses before a justice with a view to the commitment of an accused person for trial on indictment.

The Chief Justice, Sir SAMUEL GRIFFITH, accepted the analogy, but held, on the authority of *Cox v. Coleridge*, 1 B. & C., 37, that the functions of an examining justice in such a case were not judicial, but executive; and held accordingly that section 15B of the Australian Industries Preservation Act was not an invasion of the judicial power and was valid (at pp. 355-357).

#### **State Interference.**

An attempt by a State, by legislative or executive act, to interfere in any way with the free exercise of the executive power of the Commonwealth is invalid and inoperative unless expressly authorized by the Constitution: *D'Emden v. Pedder*, 1 C.L.R., 91. See p. 85, *supra*.

#### **Federal Executive Council.**

62. There shall be a Federal Executive Council to advise the Governor-General in the government of the Commonwealth, and the members<sup>109</sup> of the Council shall be chosen and summoned by the Governor-General and sworn as Executive Councillors, and shall hold office during his pleasure.

#### **§ 109. "MEMBERS OF THE COUNCIL."**

##### **Honorary Ministers.**

It has been the practice in the Commonwealth, on the formation of a Ministry, to appoint one or more Executive Councillors without portfolios, in addition to the "Ministers of State" provided for by

section 64. These "Ministers without portfolio," or "honorary or assistant Ministers," as they are called, often assist in the administration of one or other of the departments. But, though members of the Cabinet and of the Executive Council, they are not "Ministers of State" within the meaning of the Constitution. They cannot therefore exercise functions which by statute are required to be performed by a Minister of State; but as Executive Councillor they can sign executive minutes, and countersign documents for signature by the Governor-General.

In England, Cabinet Ministers on resigning their portfolios retain the title of Privy Councillor, though they cease to be summoned to meetings of the Council. The same practice holds in the Canadian Privy Council, and in the Executive Councils of some of the Australian States (*e.g.* Victoria).

**Provisions Referring to Governor-General.**

63. The provisions of this Constitution referring to the Governor-General in Council shall be construed as referring to the Governor-General acting with the advice of the Federal Executive Council.

**Ministers of State.**

64. The Governor-General may appoint officers to administer such departments<sup>110</sup> of State of the Commonwealth as the Governor-General in Council may establish.

**Ministers to sit in Parliament.**

Such officers shall hold office during the pleasure of the Governor-General. They shall be members of the Federal Executive Council, and shall be the Queen's Ministers of State for the Commonwealth.

After the first general election no Minister of State shall hold office for a longer period than three months unless he is or becomes a senator or a member of the House of Representatives.

## § 110. "DEPARTMENTS OF STATE . . . MAY ESTABLISH."

Upon the inauguration of the Commonwealth the following departments of State were established by the Governor-General under the authority of this section.

The Commonwealth Treasury, 1st January 1901.

The Attorney-General's Department, 1st January 1901.

The Department of External Affairs, 1st January 1901.

The Department of Home Affairs, 1st January 1901.

The following new departments were subsequently established under the same section.

Department.	Date constituted.	Date gazetted.
Prime Minister's ..	1/ 7/11	28/12/11
Navy ..	12/ 7/15	12/ 7/15
Works and Railways ..	13/11/16	23/11/16
Home and Territories	14/11/16	22/ 2/17
Repatriation ..	28/ 9/17	4/10/17

On the 14th November 1916, the Department of External Affairs was abolished and its functions were taken over by an amalgamated department now known as the Home Affairs and Territories.

## Number of Ministers.

65. Until the Parliament otherwise provides, the Ministers<sup>111</sup> of State shall not exceed seven in number, and shall hold such offices as the Parliament prescribes, or, in the absence of provision, as the Governor-General directs.

## § 111. "MINISTERS OF STATE."

## LEGISLATION.

## MINISTERS OF STATE ACT 1915.

The number of Ministers of State was by this Act increased from seven to eight and the appropriation of £12,000 a year for the salaries of such Ministers was increased to a sum not exceeding £13,650 per year. This was to provide for the appointment of a Minister for the Navy.

## MINISTERS OF STATE ACT 1917.

The number of Ministers of State was increased to nine and the salaries of the Ministers of State was increased to a sum not exceeding £15,300 per year. This was to provide for the appointment of a Minister for Repatriation.

## Salaries of Ministers.

66. There shall be payable to the Queen, out of the Consolidated Revenue Fund of the Commonwealth, for the salaries<sup>112</sup> of the Ministers of State, an annual sum which, until the Parliament otherwise provides, shall not exceed twelve thousand pounds a year.

## § 112. "SALARIES OF THE MINISTERS."

## LEGISLATION.

## MINISTERS OF STATE ACT 1915-1917

The lump sum of £12,000 payable per year among Ministers of State has been increased to £15,300 per year.

In *Deakin v. Webb*, 1 C.L.R., 585, the High Court held that the salaries of Ministers were not liable to assessment under the Income Tax Acts of a State. The Commonwealth Salaries Act 1907, however, authorizes the taxation by a State of the salary, earned in the State, of a Minister being a member of Parliament elected in the State; if the taxation is not at a higher rate or to a greater extent than is imposed on other salaries of the same amount earned in the State; and this Act has been held to be valid.

## Appointment of civil servants.

67. Until the Parliament otherwise provides, the appointment<sup>112a</sup> and removal of all other officers of the Executive Government of the Commonwealth shall be vested in the Governor-General in Council, unless the appointment is delegated by the Governor-General in Council or by a law of the Commonwealth to some other authority.

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**§ 112A. "APPOINTMENT AND REMOVAL OF OFFICERS."****LEGISLATION.****COMMONWEALTH PUBLIC SERVICE ACT 1902-1911.****Divisions of Service.**

The Public Service of the Commonwealth consists of four divisions. The Administrative Division includes all Permanent Heads of Departments and all Chief Officers of Departments, and also all persons whose offices the Governor-General on the recommendation of the Commissioner directs to be included in such Division. The Professional Division includes all officers whose duties require in the person performing them some special skill or technical knowledge usually acquired only in some profession or occupation different from the ordinary routine of the Public Service, and whose offices the Governor-General on the recommendation of the Commissioner directs to be included in such Division. The Clerical Division includes all officers whose offices the Governor-General on the recommendation of the Commissioner directs to be included in such Division. The General Division includes all persons in the Public Service not included in the Administrative, or Professional, or Clerical Division.

The officers in the Administrative Division (except in the case of officers paid at a specified rate by virtue of any Act) are paid such salaries as may be provided in the Appropriation Act.

In the Professional Division and General Division (except in the case of officers paid at a specified rate by virtue of any Act) the officers are paid such salaries and wages in accordance with such fixed amounts or scales as may be prescribed.

**Classes.**

The Clerical Division is divided into five classes. Each of such classes are subdivided as set forth in the Third Schedule of the Act and the rate of salary of any officer in a subdivision of any such class is that assigned to such subdivision in such Schedule.

The Act recognizes the pre-existence of departments established under sections 64 or transferred under section 69 of the Constitution.

**Permanent Heads.**

The persons for the time holding the several offices specified in the Second Schedule to the Act are described as the Permanent

Heads of the Department who are responsible for the general working of their respective departments and are required to advise the Minister in all matters relating to his Department. There are also chief officers of departments, performing such duties as may be prescribed or assigned to them.

**British Subjects only.**

With certain limited exceptions no person can be admitted to the Public Service unless he is a natural-born or naturalized subject of His Majesty, and unless he has successfully passed the examination prescribed.

**Examinations.**

Separate entrance examinations are to be held in connection with the Professional and Clerical and General Divisions respectively, designed to test the efficiency and aptitude of candidates for employment in such several Divisions ; but the educational examination for the General Division is only of an elementary or rudimentary character.

**Service Commissioner.**

Power was given to the Governor-General to appoint a Public Service Commissioner who has the powers and authorities either prescribed by the Act or imposed on him by the Governor-General. Authority was also given to him to appoint inspectors to perform such duties as the Commissioner assigns to them. The Commissioner and inspectors are to be appointed for a term of 7 years and are eligible for re-appointment.

**Powers and Functions.**

The powers and functions of the Commissioner are very great and important, viz., to propose any particular disposition of officers and offices and the division or class subdivision of class or grade of every officer and re-arrangement or improved method of carrying out any work which appears to the Commissioner necessary or expedient for the more economic efficient or convenient working of any department ; to recommend for determination the division, class, subdivision of class or grade of every officer, to keep a record of all officers showing with regard to each officer his age and length of service the office he holds and his division, class, subdivision of class or grade and salary under this Act ; to recommend alterations

of staff and transfer of officers in any Department necessary for the efficient working thereof; to recommend the rate of salary to be paid to an officer occupying any particular office at any sum within the limits of his class or grade, and such sum shall be the salary attached to such officer while he holds such office; to certify for annual increments of salaries of officers in the Clerical Division; to determine whether any officer is entitled to any increase as a reward for earnest application to duty and meritorious public service; to recommend promotions from any one class to the next higher class; to recommend transfers; to conduct examinations for entrance into the service, or for promotion or transfers therein; to determine the punishment for offences; to recommend in what case it is desirable in the interests of the Public Service to appoint to the Administrative Division or Professional Division some person who is not in the Public Service; to certify that in his opinion there is no person available in the Public Service who is capable of filling the position to which it is proposed that the appointment shall be made.

Other provisions in the Act relate to the transfer of State officers temporary employment, alteration of staff, dismissal and removals, life assurance and retirement of officers.

#### ARBITRATION PUBLIC SERVICE ACT 1911.

##### **Arbitration Organization.**

Employees in the Public Service of the Commonwealth, not including those employed in the Naval or Military Defence Force only, may form organizations of not less than one hundred in number or an association of less than one hundred employees may be formed provided it comprises at least three-fifths of all the persons who are employees in that industry in the Public Service of the Commonwealth. Such organizations may submit to the Court of Conciliation and Arbitration by plaint, any claim relating to salaries, wages, rates of pay, or terms and conditions of employment of such members. Thereupon the Court has cognizance of the claim, and can deal with it in the manner prescribed by the Commonwealth Conciliation and Arbitration Act 1904-11. The Public Service Commissioner and the Minister of any Department affected are entitled to be represented before the Court on the hearing of such claims. The Court has jurisdiction to hear and determine the claims and make any award, or give any direction in pursuance of the hearing or determination. The Public Service Commissioner, the permanent

heads, and chief officers of the several departments of State and all persons in the Public Service of the Commonwealth are required to comply with the provisions of any award or order of the Court made in pursuance of the Act. No award, order or direction of the Court, made under the Act can be challenged, appealed against, reviewed, quashed or called in question or be subject to prohibition or mandamus in any other Court on any account whatever.

#### COMMONWEALTH PUBLIC SERVICE ACT 1913.

##### State Officers.

Any officer of the public railway or other service of a State, whether appointed thereto before or after 1913 is eligible for appointment to a position in the corresponding division of the Public Service of the Commonwealth.

#### COMMONWEALTH PUBLIC SERVICE ACT 1915.

##### Special War Provisions.

In the making of appointments to the Public Service from among persons who have successfully passed the prescribed examination, preference shall be given to those persons who have served with satisfactory record in any Expeditionary Force raised under the provisions of the Defence Act 1903-1915.

The maximum age of appointees to the Clerical Division is increased from 21 to 25 years.

Any person not more than fifty years of age, who has served in the Permanent Naval Forces of the Commonwealth for the full period for which he enlisted or engaged, and has a satisfactory record shall, without passing the prescribed examination, be eligible for appointment to any office in the Department of Trade and Customs which is classified in the General Division of the Public Service.

Leave of absence may be granted to any officer who has enlisted in or been appointed to any Expeditionary Force raised under the provisions of the Defence Act 1903-15, and the duration of such leave shall not, unless the Governor-General otherwise directs, exceed the period of service of the officer with the Expeditionary



**Forces.** Leave of absence for a period not exceeding twelve months may be granted to any officer who is called up, in pursuance of the Defence Act 1903-1915 for active service in Australia. Leave of absence granted under this section shall be without pay, except for such period as may under some other provision of this Act or the Regulations be granted with pay. The period during which any officer is absent on leave granted pursuant to this section shall for all purposes be included as part of the officers' period of service.

**Temporary Employment.**

No person who has been temporarily employed in any department for six months continuously, or for six months in the whole of any twelve months, or for any extended period as hereinafter provided, shall during the six months following such temporary employment be eligible for further temporary employment in the Public Service. Upon a report from the Permanent Head of a Department that for special reasons assigned the continuance beyond the period of six months of the temporary employment of any person who has been temporarily employed in that Department for six months is desirable in the public interest, the Commissioner may authorize such extension, if he is satisfied that no other suitable person is available for the work to be performed.

**COMMONWEALTH RAILWAY ACT 1917.**

**Railway Commissioner.**

A Commissioner is appointed to manage the Commonwealth railways. Subject to the Act, the Commissioner shall appoint or employ such persons to assist in the execution of this Act as he thinks necessary, and every person so appointed shall hold office during pleasure only. The Commissioner shall pay such salaries, wages and allowances to employees as he approves and as the Parliament appropriates for that purpose. No employee appointed under this section shall without the written consent of the Commissioner engage in any employment outside the duties of his office. The Arbitration (Public Service) Act 1911 shall apply to the railway service in like manner as it applies to the Public Service of the Commonwealth:—Provided that in its application to the railway service any reference in that Act to the Public Service Commissioner shall be read as a reference to the Commonwealth Railways Commissioner.

## PUBLIC SERVICE ACT 1917.

**Privileges to Soldiers.**

The privileges and concessions granted by the Act of 1915 and 1916 to men who have served in any Expeditionary Force, are extended to include members of the Army Medical Corps Nursing Service accepted or appointed by the Director-General of Medical Services for service outside Australia and to members of the Naval Force, who have been on active service outside Australia, or on ships of war.

Any person who has served with satisfactory record in any Expeditionary Force and who is eligible for appointment to the clerical division may be appointed to such class and subdivision as the Commissioner determines.

The Commissioner is empowered to specify that any particular public examination for admission to the clerical division is limited to persons who have served with satisfactory record in any Expeditionary Force.

The Governor-General may by regulations prescribe that any person who has served with satisfactory record in any Expeditionary Force, and who has passed a prescribed examination conducted by a University or other examining body, in any part of the British Dominions shall be deemed to have passed a prescribed examination under the Act, notwithstanding that such outside University or other examination is not a competitive one.

Any person who has served with satisfactory record in any Expeditionary Force and whose age at last birthday previous to appointment was not more than fifty years, and who has passed the prescribed examination, before or after the passing of this Act may be appointed to the clerical division.

The temporary employment of a person who has served with satisfactory record in any Expeditionary Force may have the privilege of having the usual six months' limit extended from time to time by the Commissioner upon a report being made by the permanent head that such person has satisfactorily performed his duties.

## PAPUA ACT 1905.

**Lieutenant Governor.**

The Lieutenant-Governor may in the name of the Governor-General appoint all necessary judges, magistrates, and other officers of the Territory, who shall, unless otherwise provided by law, hold their office during the pleasure of the Governor-General. Every such appointment shall be temporary until approved by the Governor-General. The Lieutenant-Governor may, upon sufficient cause to him appearing, suspend from office any officer of the Territory. Notwithstanding anything contained in the Commonwealth Public Service Act 1902 the Governor-General may, on the recommendation of the Public Service Commissioner, and on his certificate that it is desirable in the interests of the Commonwealth that the appointment be made, appoint any officer of the Territory (other than an officer whose appointment is temporary) to any office in the Clerical Division of the Public Service of the Commonwealth, and may on the like recommendation require the officer to effect and continue such an assurance on his life as the Governor-General thinks fit.

## HIGH COMMISSIONER ACT 1909.

**High Commissioner.**

The Governor-General may, subject to the Commonwealth Public Service Act 1902, appoint officers for the performance of any duties required in the execution of this Act. The Governor-General may except any such officer from any or all of the provisions of the Public Service Act.

The High Commissioner may appoint officers for the performance of any duties required in the execution of this Act. Such appointments shall be made in accordance with such instructions in that behalf as he receives from the Minister. Every such appointment shall cease to have effect at the expiration of six months from the date of appointment, unless the Governor-General in the meantime confirms the appointment.

## COMMONWEALTH PUBLIC SERVICE ACT 1918.

**Telegraph Messengers.**

Under the Act of 1902-11, section 32 (a), persons employed as telegraph messengers must, on attaining the age of eighteen years, leave the public service unless they have passed the prescribed

examination. By the Act of 1918, this law does not apply to telegraph messengers who have served with satisfactory record in the Expeditionary Forces, and who have attained the age of eighteen years after the 1st of November, 1915, unless the Commissioner otherwise directs.

### **Examinations Dispensed with.**

Where the Commissioner reports to the Governor-General that it is not desirable that the system of examination should be applied in relation to any appointment to a specified position, or appointments to a specified class of positions, in the General Division, there may be appointed to that position, or to a position in that class, a person who has not passed the prescribed examination. In making appointments under the provisions of this section, preference shall be given to persons who have served with satisfactory record in any Expeditionary Force raised under the provisions of the Defence Act 1903-1917. Where the Governor-General so directs persons appointed under the provisions of this section shall not be subject to the provisions of Part IV. of this Act.

### **Aliens.**

If after inquiry a Royal Commission appointed under the Royal Commissions Act 1902-1912 to inquire into the origin of birth and parentage of persons in the Public Service or employ reports to the Governor-General that it is of opinion that the continuance of any person in the Public Service or employ is detrimental to the public safety or the defence of the Commonwealth, the Governor-General may dismiss the person from the Public Service or employ. No person who is dismissed from the Commonwealth Public Service or employ in pursuance of this section shall be entitled to make any claim against the Commonwealth by way of compensation or otherwise in respect of his dismissal. This section shall be deemed to have commenced on the first day of May, 1918.

### **Holidays.**

In addition to the days mentioned in the Principal Act, viz. :— Christmas and the following day, New Year, 26th January, Good Friday and the following Saturday and Monday, and King's Birthday holidays, there may be observed as public holidays or half-holidays in the public offices of the Commonwealth, or in any part thereof, such additional days or half-days, not exceeding in the whole,

in the case of any office, four days in any one calendar year, as are prescribed. The Governor-General may by proclamation at any time for any special occasion appoint, in addition to the days hereinbefore named, any specified day or half-day to be observed as a holiday or half-holiday in the public offices of the Commonwealth or in any part thereof. The Minister of a Department or the permanent head or chief officer thereof may require the department or any part thereof to be kept open in the public interest for the whole or any portion of a holiday observed in pursuance of any of the preceding sub-sections, and may require the attendance and services of any officer of the department during that holiday ; but in that case that officer shall be granted an amount equal to a day's salary if a full day's attendance has been required and a proportionate amount if less than a full day's attendance has been required. Provided that no proportionate payment shall be less than one-half day's pay. Where the hours of duty of any officer are arranged by schedule and the attendance and services of that officer are required during any holiday observed in pursuance of this section, that officer shall not be entitled to receive in respect of his attendance and services during that holiday an amount greater than a full day's salary. The Regulations may prescribe that the performance, by an officer on a holiday, of duty commencing at or after a prescribed hour of commencement, or terminating at or before a prescribed hour of termination, shall not be deemed to be the performance of duty on a holiday. This section commences on the first day of January, 1919.

#### **Public Servants.**

The Commonwealth has exclusive power to make laws dealing with all persons in the Commonwealth Public Service, and regulating and, if necessary, reducing their salaries ; and there is nothing in section 84 of the Constitution to limit this power : *Cousins v. Commonwealth*, (1906) 3 C.L.R., at p. 542.

In the United States, it has been held that Congress has power to prescribe all needful regulations for the discipline of Government officers, and to declare what breaches of discipline shall be treated as criminal offences. The power to forbid conduct which is incompatible with the proper discharge of official duties, or which impair efficiency or tend to demoralize the public service, is necessarily vested in Congress ; Congress has a wide discretion in determining

what acts are of that character ; and only when Congress has palpably transgressed the limits will the judiciary interfere. Such a case might arise if Congress should attempt to forbid an act of a nature pertaining so exclusively to the sphere of private conduct that it could not, by any implication, infringe upon official deportment or discipline. Accordingly, section 6 of the Act of Congress of 15th August 1876, c. 287, which forbids officers to give to, or solicit or receive from, other officers any money for political purposes, was held to be constitutional: *United States v. Curtis*, (1882) 12 Fed. R., 824.

### **Concurrent Powers in Criminal Matters.**

In Western Australia, a prisoner was convicted under section 471 of the Criminal Code of the State, passed in 1902, of uttering a false document, to wit, a telegram, contrary to State law. On a case stated to the Supreme Court of the State, it was argued that the State law, as applied to telegrams, was an encroachment on the exclusive Commonwealth power as to matters relating to the Post and Telegraph Department. The Court, however, sustained the conviction, holding that the State retained power to deal with the offence (which only indirectly affected the postal authorities) under its general criminal law—notwithstanding that the act might also be punishable under Federal law: *R. v. McDonald*, (1906) 8 W.A.R., 149.

### **Command of Naval and Military Forces.**

68. The command<sup>113</sup> in chief of the naval and military forces of the Commonwealth is vested in the Governor-General as the Queen's representative.

### **§ 113. "COMMAND IN CHIEF."**

#### **LEGISLATION.**

#### **DEFENCE ACT 1903-1915, Sections 53, 55.**

In time of war, the Governor-General may, subject to the provisions of this Act, place the Defence Force or any part thereof under the orders of the Commander of any portion of the King's Regular Forces or the King's Regular Naval Forces, as the case may be. The Military Forces shall at all times, while on active service, whether within or without the limits of the Commonwealth,

be subject to the Army Act save so far as it is inconsistent with this Act ; but so that the regulations may prescribe that any provisions of the Army Act shall not apply to the Military Forces.

### NAVAL DEFENCE ACT 1911, Section 3.

Whenever the Commonwealth Naval Forces are acting with any part of the King's Naval Forces or any part of the naval forces of any part of the King's Dominions, then, subject to any order made by the Governor-General, under the next following sub-section the forces so acting together shall, while so acting, be deemed to be one force or unit of a force in command of the senior naval officer present and acting in a position of command, and, subject to his orders, all officers in the force or unit shall have, as regards command and discipline in relation to the Commonwealth Naval Forces, the same powers and authority as if they were officers of the Commonwealth Naval Forces.

Where any arrangement has been made between the Government of the Commonwealth and the Government of the United Kingdom or the Government of any part of the King's Dominions in relation to any joint action or mutual action in relation to training or service by the Naval Forces of the Commonwealth and the Naval Forces of the King and the naval forces of any part of the King's dominions or any of those forces, the Governor-General may, by order published in the *Gazette*, give such directions or instructions as he thinks fit to carry out the arrangement. Any order made by the Governor-General in pursuance of this section shall have effect as if it were enacted in this Act.

#### Transfer of Certain Departments.

69. On a date or dates to be proclaimed by the Governor-General after the establishment of the Commonwealth the following departments of the public service in each State shall become transferred<sup>114</sup> to the Commonwealth :—

Posts, telegraphs, and telephones :

Naval and military defence :

Lighthouses, lightships, beacons, and buoys :  
Quarantine.

But the departments of customs and of excise in each State shall become transferred to the Commonwealth on its establishment.

**§ 114. "SHALL BECOME TRANSFERRED."**

**Order and Mode of Transfer.**

The State Departments of Posts, Telegraphs, and Telephones, and of Naval and Military Defence, were transferred to the Commonwealth, by proclamation under this section, on 1st March 1901.

As regards lighthouses, etc., and quarantine, no proclamation under this section was ever issued. The explanation is that the section only gives power to take over a "Department" as a whole, with no means of defining or selecting what should be taken. There were no distinct and independent departments of lighthouses or quarantine. Many harbour beacons and buoys were of no Federal concern, and the administration of quarantine was blended with that of public health generally. Consequently, when it was desired to assume Federal control over marine lights and quarantine, this was done by legislation under paragraphs (VII) and (IX) of section 51 of the Constitution. See notes on those subsections.

**Official Status and Rights.**

Upon the transference of State Departments to the Commonwealth under section 69 of the Constitution the rights of the officers of the department are definitely ascertained and settled, and an officer in such a department who is retained in the service of the Commonwealth preserves all his "existing and accruing rights." Under section 84 of that instrument these rights include a right to be retained in the service at his existing rate of remuneration. It is a question as to whether he is liable to have his rate of remuneration reduced by a competent authority, as would be the case if he remained in the State service, and, if so, what is such competent authority. The Commonwealth Public Service Act 1902, section 78 (1) has no operation upon the "existing rights" declared by section 84 of the Constitution to be preserved to officers transferred to



and retained in the service of the Commonwealth. Section 84 operates as a charge upon the Commonwealth revenue of a sum sufficient to give effect to it, and as a sufficient authority to the Executive Government of the Commonwealth to make the necessary payments to the persons entitled to receive them: *Bond v The Commonwealth of Australia*, (1903) 1 C.L.R., 13; 25 A.L.T., 200; 9 A.L.R., 254.

Certain Powers of Governors to vest in Governor-General.

70. In respect of matters which, under this Constitution, pass to the Executive Government of the Commonwealth, all powers and functions<sup>114A</sup> which at the establishment of the Commonwealth are vested in the Governor of a Colony, or in the Governor of a Colony with the advice of his Executive Council, or in any authority of a Colony, shall vest in the Governor-General or in the Governor-General in Council, or in the authority exercising similar powers under the Commonwealth, as the case requires.

§ 114A. "ALL POWERS AND FUNCTIONS."

**Determining Amount of Retiring Allowance.**

An officer of a department of the public service of New South Wales who, on the transfer of the department to the Commonwealth, was retained in the service of the Commonwealth, was afterwards called upon to retire under the provisions of sec. 65 of the Commonwealth Public Service Act 1902, and so became entitled by virtue of section 84 of the Constitution to a gratuity calculated in accordance with the scale provided by section 60, sub-section (ii.) of the New South Wales Public Service Act 1895. It was held by the High Court that the discretion conferred by section 60 sub-section (ii.) of the New South Wales Act as to the amount of the gratuity was vested in the Governor-General by virtue of section 70 of the Constitution: *The State of New South Wales v. The Commonwealth*, (1908) 6 C.L.R., 215.

## CHAPTER III.—THE JUDICATURE.

## Judicial Power and Courts.

71. The judicial<sup>115</sup> power of the Commonwealth shall be vested in a Federal Supreme Court, to be called the High Court<sup>116</sup> of Australia, and in such other<sup>117</sup> federal courts as the Parliament creates, and in such other courts as it invests with federal jurisdiction. The High Court shall consist of a Chief Justice, and so many other Justices, not less than two, as the Parliament prescribes.

## Conspectus of Notes to Section 71.

## § 115. "THE JUDICIAL POWER."

- Distinction between judicial and ministerial power.
- Industrial arbitration.
- Construction of State statutes.
- Over-ruling prior decisions.
- Contempt of Court.

## § 116. "THE HIGH COURT OF AUSTRALIA."

## § 117. "OTHER FEDERAL COURTS."

## § 115. "THE JUDICIAL POWER."

The Judicial power of the Commonwealth is the power to hear and determine suits and controversies, *inter partes*, arising in the primary or original jurisdiction and in the appellate or final jurisdiction defined by the Constitution, Chapter III.

**Distinction between Judicial and Ministerial Power.**

The Australian Industries Preservation Act 1906, section 15B authorizes the Comptroller-General of Customs to put certain questions to and to demand answers from, persons suspected of being concerned in contracts, in restraint of inter-state trade; answers to such questions when given may be used as evidence against such persons in any subsequent legal proceedings.

In the case of *Huddart Parker & Co. Proprietary Ltd. v. Moorhead*, (1909) 8 C.L.R., 331, the validity of section 15B was impeached and the question for determination was whether this compulsory discovery vested in a non-judicial officer, appertains to the judicial power. It was argued for the appellant that the proceeding objected

to was in principle analogous to the examination of witnesses before a Justice of the Peace with a view to the commitment of an accused person for trial on indictment ; that in the event of the accused being tried before a Justice of the High Court without a jury the analogy would be complete, while, if he were tried on indictment and a preliminary investigation before Justices of the Peace were necessary, the result would only be to divide the preliminary inquiry into two stages not differing in essential quality ; that such proceedings before Justices of the Peace, are always regarded as judicial proceedings, that they must, therefore, be regarded as an exercise of the judicial power ; and further that the interrogation of witnesses with a view to the administration of either the criminal or civil law is a matter that is in practice in British countries entrusted to judicial tribunals, and must, therefore, be regarded as within the term "judicial power" as used in section 71 of the Constitution. For the Commonwealth it was admitted that there was an analogy between the powers conferred on the Comptroller-General and those exercised by examining justices. It was also conceded that of recent years Justices exercising the function of preliminary examination were sometimes regarded and spoken of as exercising judicial functions.

It therefore became necessary to enquire what was the true nature of their functions. On this point the case of *Cox v. Coleridge* (1822) 1 B. & C., 37 is very instructive and authoritative. This case which was referred to by the Chief Justice (Sir SAMUEL GRIFFITH) during the argument shows that at common law the original function of justices of the peace was ministerial and in no sense judicial. All the judicial functions which they have lately acquired have been conferred by Statute.

Referring to *Cox v. Coleridge*, the Chief Justice (Sir SAMUEL GRIFFITH) said :—" I think this case must be taken as an authoritative exposition of the law on the subject as it then stood. It is true that since that time many laws have been passed both in England and Australia regulating the procedure in such inquiries, but I do not think that they have the effect of altering the essential nature of the inquiry, which cannot be regarded now, any more than then, as an exercise of judicial functions. If this is the correct view, it follows that the inquiry by the Comptroller-General, whether regarded as a substitute for, or as a preliminary step to, an inquiry by justices, cannot be regarded as a judicial function, and the foundation is

this argument consequently fails. "It is plain that the power which, by section 71 of the Constitution, is to be exercised by Courts is a power of such a nature that an appeal will lie to the High Court from anything done in its exercise. It is equally plain that an appeal does not lie to any Court either from an order of commitment or an order of discharge made by examining justices. For this reason also I think that the proceedings before them cannot be regarded as an exercise of judicial power. Apart from these considerations, I am of opinion that the words 'judicial power' as used in section 71 of the Constitution mean the power which every sovereign authority must of necessity have to decide controversies between its subjects, or between itself and its subjects, whether the rights relate to life, liberty or property. The exercise of this power does not begin until some tribunal which has power to give a binding and authoritative decision (whether subject to appeal or not) is called upon to take action." *Per* GRIFFITH, C.J., 8 C.L.R., at pp. 355-6.

Mr Justice ISAACS said:—"The question of what is judicial power cannot arise in a unitary State in the precise form in which it presents itself here, because, where the legislature is supreme, the only question is the ascertainment of its will. For this reason English precedents of a strictly decisive character are not to be obtained. It is only where, as in the United States of America and the Commonwealth of Australia, the Legislature is of itself bound to conform to an organic law that the question becomes acute. Even in America we do not find a perfect analogy, because the judicial power of the United States is not only vested in the Courts, but is limited in extent to the ten descriptions of cases specified in the Constitution, so that the test of what is 'judicial power,' is not to be found by merely ascertaining the ambit of the judicial power which the Courts there possess. I have found no assistance from any of the American cited cases."

After quoting and examining a number of English authorities, including Sir WM. BLACKSTONE'S *Commentaries*, vol. 1, p. 148, His Honor continued —. . . "Taking these high authorities as affording the guiding principles for our present purpose, it appears to me the objection to section 15B that it is an exercise of the judicial power is untenable. It is ministerial and its analogue can be found in almost every Customs Act."

## PAPUA ACT 1905.

**Lieutenant Governor.**

The Lieutenant-Governor may in the name of the Governor-General appoint all necessary judges, magistrates, and other officers of the Territory, who shall, unless otherwise provided by law, hold their office during the pleasure of the Governor-General. Every such appointment shall be temporary until approved by the Governor-General. The Lieutenant-Governor may, upon sufficient cause to him appearing, suspend from office any officer of the Territory. Notwithstanding anything contained in the Commonwealth Public Service Act 1902 the Governor-General may, on the recommendation of the Public Service Commissioner, and on his certificate that it is desirable in the interests of the Commonwealth that the appointment be made, appoint any officer of the Territory (other than an officer whose appointment is temporary) to any office in the Clerical Division of the Public Service of the Commonwealth, and may on the like recommendation require the officer to effect and continue such an assurance on his life as the Governor-General thinks fit.

## HIGH COMMISSIONER ACT 1909.

**High Commissioner.**

The Governor-General may, subject to the Commonwealth Public Service Act 1902, appoint officers for the performance of any duties required in the execution of this Act. The Governor-General may except any such officer from any or all of the provisions of the Public Service Act.

The High Commissioner may appoint officers for the performance of any duties required in the execution of this Act. Such appointments shall be made in accordance with such instructions in that behalf as he receives from the Minister. Every such appointment shall cease to have effect at the expiration of six months from the date of appointment, unless the Governor-General in the meantime confirms the appointment.

## COMMONWEALTH PUBLIC SERVICE ACT 1918.

**Telegraph Messengers.**

Under the Act of 1902-11, section 32 (a), persons employed as telegraph messengers must, on attaining the age of eighteen years, leave the public service unless they have passed the prescribed

examination. By the Act of 1918, this law does not apply to telegraph messengers who have served with satisfactory record in the Expeditionary Forces, and who have attained the age of eighteen years after the 1st of November, 1915, unless the Commissioner otherwise directs.

#### **Examinations Dispensed with.**

Where the Commissioner reports to the Governor-General that it is not desirable that the system of examination should be applied in relation to any appointment to a specified position, or appointments to a specified class of positions, in the General Division, there may be appointed to that position, or to a position in that class, a person who has not passed the prescribed examination. In making appointments under the provisions of this section, preference shall be given to persons who have served with satisfactory record in any Expeditionary Force raised under the provisions of the Defence Act 1903-1917. Where the Governor-General so directs persons appointed under the provisions of this section shall not be subject to the provisions of Part IV. of this Act.

#### **Aliens.**

If after inquiry a Royal Commission appointed under the Royal Commissions Act 1902-1912 to inquire into the origin of birth and parentage of persons in the Public Service or employ reports to the Governor-General that it is of opinion that the continuance of any person in the Public Service or employ is detrimental to the public safety or the defence of the Commonwealth, the Governor-General may dismiss the person from the Public Service or employ. No person who is dismissed from the Commonwealth Public Service or employ in pursuance of this section shall be entitled to make any claim against the Commonwealth by way of compensation or otherwise in respect of his dismissal. This section shall be deemed to have commenced on the first day of May, 1918.

#### **Holidays.**

In addition to the days mentioned in the Principal Act, viz.:—Christmas and the following day, New Year, 26th January, Good Friday and the following Saturday and Monday, and King's Birthday holidays, there may be observed as public holidays or half-holidays in the public offices of the Commonwealth, or in any part thereof, such additional days or half-days, not exceeding in the whole,

principal seat of the High Court is to be at such place as the Governor-General from time to time appoints. There is to be a principal registry at the principal seat of the Court as well as District Registries. Power is given to appoint registrars, marshalls, and other officers.

### § 117. "OTHER FEDERAL COURTS."

The original judicial power of the Commonwealth is not entirely centralized in or monopolized by the High Court of Australia ; it may be by Federal legislation vested in other Federal Courts specially created by Parliament and in State Courts clothed with Federal jurisdiction.

Judges' Appointment, Tenure, and Remuneration.

72. The Justices of the High Court and of the other courts created by the Parliament—

- (i.) Shall be appointed<sup>118</sup> by the Governor-General in Council :
- (ii.) Shall not be removed except by the Governor-General in Council, on an address from both Houses of the Parliament in the same session, praying for such removal on the ground of proved misbehaviour or incapacity :
- (iii.) Shall receive such remuneration<sup>119</sup> as the Parliament may fix ; but the remuneration shall not be diminished during their continuance in office.

### § 118. "APPOINTED."

The following are the dates of the Commissions of the Chief Justice, Sir SAMUEL W. GRIFFITH and the several Justices of the High Court who have so far held office :—

The Chief Justice, 5th October, 1903 ;  
 Mr. Justice O'CONNOR, 5th October, 1903 ; \*  
 Mr. Justice BARTON, 5th October, 1903 ;  
 Mr. Justice ISAACS, 12th October, 1906 ;  
 Mr. Justice HIGGINS, 13th October, 1906 ;  
 Mr. Justice DUFFY, 11th February, 1913 ;  
 Mr. Justice POWERS, 5th March, 1913 ;  
 Mr. Justice RICH, 5th April, 1913.

\*Died, 18th November, 1912.

**§ 119. "REMUNERATION."**

The Chief Justice receives a salary of £3,500 per year, and each Justice receives a salary of £3,000 per year, also travelling expenses considered reasonable by the Governor-General.

By an Act passed in the session of 1918, provision was made for payment of a pension or annuity to the first Chief Justice upon his resignation of his office.

Such pension or annuity to continue during his life and to be of an amount equal to what he would have been entitled to demand under the laws of Queensland had he continued to occupy the office of Chief Justice of Queensland during the period, during which he has occupied the office of Chief Justice of the High Court of Australia.

**§ 120 "APPELLATE JURISDICTION."**

Appellate Jurisdiction of High Court. <sup>120</sup>

73. The High Court shall have jurisdiction, with such<sup>121</sup> exceptions and subject to such regulations as the Parliament prescribes, to hear and determine appeals<sup>122</sup> from all judgments,<sup>123</sup> decrees, orders and sentences—

- (i.) Of any Justice or Justices<sup>124</sup> exercising the original jurisdiction of the High Court :
- (ii.) Of any other<sup>125</sup> federal court, or court exercising federal<sup>126</sup> jurisdiction ; or of the Supreme<sup>127</sup> Court of any State, or of any other<sup>128</sup> court of any State from which at the establishment of the Commonwealth an appeal lies to the Queen in Council :
- (iii.) Of the Inter-State Commission,<sup>129</sup> but as to questions of law only :

and the judgment of the High Court in all such cases shall be final<sup>130</sup> and conclusive.

But no exception or regulation prescribed by the Parliament shall prevent the High Court from hearing and determining any appeal from the Supreme Court



of a State in any matter in which at the establishment of the Commonwealth an appeal lies from such Supreme Court to the Queen in Council,

Until the Parliament otherwise provides, the conditions of and restrictions on appeals to the Queen in Council from the Supreme Courts of the several States shall be applicable to appeals from them to the High Court.

### CONSPECTUS OF NOTES TO SECTION 73.

- §120. "APPELLATE JURISDICTION."  
Limits of appellate power.
- §121. "EXCEPTIONS."
- §122. "APPEAL."
- §123. "ALL JUDGMENTS" &c.
- §124. "JUSTICE EXERCISING ORIGINAL JURISDICTION."  
Legislation.  
Judiciary Act 1903-1910, sections 27, 34, 77.
- §125. "ANY OTHER FEDERAL COURT."  
Legislation.  
Commonwealth Conciliation and Arbitration Act 1904-1911, section 11.  
Commonwealth Conciliation and Arbitration Act 1915, section 21AA.
- §126. "ANY COURT EXERCISING FEDERAL JURISDICTION."  
Appeal to High Court in Federal cases.  
Mode of appeal.  
Appeals as of right.  
Test of Federal jurisdiction.  
State procedure in Federal jurisdiction.  
Time limit.  
Matters pending in High Court.  
Removal of Federal causes.  
Mandamus prohibition and injunction.  
The power of removal—a branch of appeal.  
Appeal in Commonwealth indictable cases.
- §127. "SUPREME COURT OF ANY STATE."  
Legislation.  
Judiciary Act 1903-1910, section 35.  
Appeals as of right.  
Any summons or matters.  
Appellate amount.

§127. "SUPREME COURT OF ANY STATE."—*continued.*

Claims indirectly involved.  
Status—marriage—divorce.  
Interlocutory judgment.  
Special leave in civil cases.  
Habeas corpus.  
New trials.  
Appeals from verdict of juries in civil cases.  
Leave and special leave to appeal.  
Special leave in criminal cases.  
Rule re-stated.  
Appeal after acquittal by jury.

## §128. "OTHER COURTS OF A STATE."

## §129. "INTER-STATE COMMISSION."

## §130. "FINAL AND CONCLUSIVE."

**Limits of Appellate Power.**

The Constitution, section 73, gives to the High Court, subject to exceptions and conditions to be prescribed by Parliament, jurisdiction to hear and decide appeals from any Justice of the High Court, sitting in primary jurisdiction; from other Federal Courts; from Courts exercising Federal jurisdiction; or from the Supreme Court of any State; or from any Court of final appeal in a State, and from the Inter-State Commission. The Judiciary Act 1903-1910, section 35, prescribes the conditions and exceptions to the right of appeal from Supreme Courts of States.

The Commonwealth Parliament has no authority to create any additional appellate jurisdiction. The authority, if any, of the Court to hear an appeal is to be sought not in the Judiciary Act, but in the Constitution itself. Section 35 of the Judiciary Act is to be regarded not as a provision for creating rights of appeal, but as making exceptions from the jurisdiction conferred by the Constitution and prescribing regulations as to its exercise. It has been passed by Parliament as its interpretation of the method of exercising the excepting and regulating power. For the most part it appears to confer jurisdiction affirmatively; it defines rather than excepts. In some respects it regulates. By defining the cases in which appeals may be brought, the implication is raised that appeals cannot be brought in any other cases. The section should, therefore, be construed not as giving jurisdiction, but as making exceptions by implying a negation of jurisdiction in every case where jurisdiction does not purport to be affirmatively given: *Quick and Garran's Annot. Const.*, at p. 738.

Although it stands under the heading "Appellate Jurisdiction," section 35 of the Judiciary Act does not purport to be an enumeration of all the Courts from which appeals can be brought to the High Court. If it did purport to be such, it would not be complete. It refers only to appeals from State Supreme Courts and other State Courts from which, at the establishment of the Constitution, appeals could be brought direct to the Queen in Council; it is silent as to appeals from inferior State Courts invested with Federal jurisdiction.

The right of litigants to appeal from such Courts, direct to the High Court is given by the Constitution, section 73, subject to conditions prescribed by the Judiciary Act, section 39 (b) and (c): *Quick and Groom's Judicial Power*, p. 143.

It should be noted that section 35 of the Judiciary Act. does not confer Federal jurisdiction on any State Court; it merely affirms that there may be an appeal as of right in specific cases, and by leave or by special leave in other cases, against the judgments given or pronounced by State Supreme Courts, whether in the exercise of Federal jurisdiction or otherwise. We have to look elsewhere for provisions investing the Supreme Courts and other Courts of the States with Federal jurisdiction; that provision is to be found in section 39 of the Judiciary Act, where it is hedged about with conditions of a most precise character. The main object of those conditions is to confer Federal jurisdiction on State Courts, *sub modo*, reserving to the High Court exclusive appellate jurisdiction in such cases: *Quick and Groom's Judicial Power*, at p. 144.

### § 121. "EXCEPTIONS."

Parliament may make exceptions and regulations limiting the right of appeal to the High Court from all judgments, decrees, orders and sentences:—

1. Of Justices of the High Court exercising original jurisdiction;
2. Of any other Federal Court such as the Conciliation and Arbitration Court;
3. Of any Court exercising Federal jurisdiction;
4. Of the Supreme Court of any State;
5. Of the Inter-State Commission but as to questions of law only.

**§ 122. " APPEALS."**

The appellate jurisdiction of the High Court is the creature of Statute, and the Court is not at liberty to say that because an appeal lies to the High Court from all judgments, orders, decrees, and sentences of the Supreme Courts of the States it would entertain applications to review them except in accordance with the law and practice of the Court : *Dagnino v. Bellotti*, 11 App. Cas., 604.

Whatever power the High Court may have to entertain an appeal from a judgment of the Supreme Court of a State, it must give judgment according to the law of that State. In other words, the power to entertain an appeal does not confer on the Court of Appeal power to administer a different law. If, therefore, this Court had in any case jurisdiction to entertain an application for a new trial in a criminal case, it would be bound in dealing with the application to apply the law of the State as to granting new trials in such cases. The Court cannot make a new law to itself. It cannot grant an appeal which would be futile or abortive and unenforceable by the law of the State. *Per* GRIFFITH, C.J. in *The King v. Snow*, (1916) 20 C.L.R., at p. 325.

The circumstance that in referring to the exercise of the Royal Prerogative the word " appeal " is sometimes used in an extended sense, cannot enlarge its meaning as used in the Constitution of the Australian Commonwealth, so as to include a general power of supervision over the proceedings of the Supreme Courts of the States. *Per* GRIFFITH, C.J. in *The King v. Snow*, (1915) 20 C.L.R., at p. 327.

**§ 123. " ALL JUDGMENTS, DECREES, ORDERS AND SENTENCES."**

As to the meaning of these expressions, see notes *infra*, under the heading of " Appeal " " New Trial."

**§ 124. " JUSTICE EXERCISING ORIGINAL JURISDICTION."****LEGISLATION.**

JUDICIARY ACT 1903-1910, Sections 27, 34 and 77.

The High Court has jurisdiction to hear and determine appeals from all judgments whatsoever of any Justice or Justices, exercising the original jurisdiction of the High Court whether in Court or Chambers, with the following exceptions, viz. :—

(1) An appeal shall not lie to the High Court from a decision of a Justice of the Court, or from a decision of the Supreme Court of a State exercising Federal jurisdiction, with respect to costs which are in the discretion of the Court, except by leave of the Justice or Court.

(2) In the case of error apparent on the face of the proceedings, an appeal shall not without the special leave of the High Court be brought to the High Court from a judgment or sentence pronounced on the trial of a person charged with an indictable offence against the laws of the Commonwealth.

### § 125. "ANY OTHER FEDERAL COURTS."

The High Court was established by the Constitution, but in addition to the High Court, Parliament may create and organize other Federal Courts, and invest them with Federal jurisdiction.

Parliament could create Circuit Courts of primary jurisdiction, similar to those established by Congress in the United States, or Courts dealing with special matters such as inter-state and external commerce. The Judges of such Courts, however, would have to be appointed subject to the same life and good behaviour tenure as that prescribed for Justices of the High Court by the Constitution, section 72. The Inter-State Commission is not such a Court: *Commonwealth v. New South Wales*, (1915) 20 C.L.R., 54. The Commonwealth Conciliation and Arbitration Court is such a Court: it is a judicial body although it cannot enforce its own decisions: *Waterside Workers' Union v. J. W. Alexander Ltd.*, 25 C.L.R., 434; (1918) A.L.R., 341.

### LEGISLATION.

#### COMMONWEALTH CONCILIATION AND ARBITRATION ACT 1904-1911, Section 31.

"No award or order of the Commonwealth Conciliation and Arbitration Court shall be challenged, appealed against, reviewed, quashed or called in question or to be subject to prohibition or mandamus in any Court on any account whatever." As to whether this denial of the right of appeal to the High Court deprives the Court of its original corrective jurisdiction to grant prohibition or mandamus, see Notes to section 75 (v.), § Prohibition, Mandamus, Injunction.

## CONCILIATION AND ARBITRATION ACT 1915, Section 21AA.

The Commonwealth Conciliation and Arbitration Act 1904-1915, section 21AA, enabling one Justice of the High Court to decide whether in a given case there is an industrial dispute within the meaning of section 51 (xxxv.) of the Constitution is a valid exercise of the legislative power of the Parliament. So held by ISAACS, HIGGINS, GAVAN DUFFY, POWERS and RICH, JJ. (GRIFFITH, C.J. and BARTON, J., dissenting). It was held, also, by ISAACS, HIGGINS, GAVAN DUFFY, POWERS and RICH, JJ., that the provision in sub-section 4 of section 21AA that the decision of a Justice of the High Court that there is an industrial dispute is not to be subject to any appeal to the High Court, in its appellate jurisdiction is an exception from that jurisdiction within the meaning of section 73 of the Constitution. By ISAACS, GAVAN DUFFY and RICH, JJ. :—Sub-section 4 of section 21AA only applies to a decision of a Justice sitting in Chambers. By HIGGINS, J. :—Even if sub-section 4 of section 21AA were invalid, the rest of the section would be valid ; and it is the duty of the Justice before whom the application comes to proceed with the inquiry in pursuance of the words of the Act, and to leave the effect of his decision for proceedings in which the question of its effect can no longer be evaded or postponed : *Federated Engine-Drivers' and Firemen's Association of Australasia v. Colonial Sugar Refining Co. Ltd.*, F.C. (1916) 22 C.L.R., 103.

## § 126. “ANY COURT EXERCISING FEDERAL JURISDICTION.”

## LEGISLATION.

## JUDICIARY ACT (1903), Section 39.

The Supreme Courts of States, as well as the inferior State Courts, such as District Courts, County Courts, Courts of General Sessions, Courts of Petty Sessions, Small Debt Courts, have been invested with Federal jurisdiction under the Constitution, section 77 (III.) ; that is, exercising the judicial power of the Commonwealth assigned to them ; engaged in the administration of Commonwealth law as distinguished from State law ; matters arising under the Constitution or involving its interpretation ; matters arising under any law made by the Parliament.

**Appeal to High Court in Federal Cases.**

Every decision of the Supreme Court of a State, in Federal jurisdiction, shall be final and conclusive “except so far as an appeal may be brought to the High Court.”

Wherever an appeal lies from the decision of any Court or Judge of a State to the Supreme Court of the State, an appeal from a decision in Federal jurisdiction may be brought to the High Court. The High Court may grant special leave to appeal to the High Court from any decision in Federal jurisdiction of any Court or Judge of a State notwithstanding that the law of the State may prohibit any appeal from such Court or Judge.

### **Mode of Appeal in Federal Cases.**

Under the Rules of Court, Part II., section III., rule 1 (22nd August, 1904) an appeal to the High Court in Federal jurisdiction cases is to be brought in the same manner as is prescribed by the law of the State for bringing appeals from the same Court to the Supreme Court of the State in like matters.

In the case of *Ex parte Gordon*, (1906) 3 C.L.R., 725, the defendant was convicted in the Police Court, Sydney, for an offence against the Immigration Act 1901, and was fined £100. An application was made to the High Court on behalf of Gordon for a rule *nisi* for a prohibition to the magistrates. The Chief Justice, Sir SAMUEL GRIFFITH, said :—" In this case the matter was heard by a magistrate exercising Federal jurisdiction, and from his decision an appeal lies to the Supreme Court, and therefore under that section an appeal may be brought to the High Court. In granting rules *nisi* for a prohibition it is usual for the Supreme Court to satisfy itself that the correctness of the decision is open to doubt, and it is not uncommon to refuse a rule *nisi*. Without saying that we will grant a rule *nisi* in every case in which it is asked for, we think we should be somewhat liberal in the interpretation of section 39 (b) of the Judiciary Act 1903, considering that, by the adoption of another form of appeal, an appeal might be brought without the leave of this Court. Without expressing any opinion as to the merits we think we should grant a rule *nisi*."

The right of appeal in Federal matters given by section 73, subsection (II.) may be exercised by different methods of procedure under varying names according to the provisions of State laws. Thus it has been held by the Full Court of New South Wales that appeal includes in New South Wales a statutory prohibition granted by the Supreme Court (*Ex parte Oesselmann*, (1902) 2 S.R. (N.S.W.), 149); and by the Supreme Court of Victoria that appeal includes

in Victoria proceedings in the Supreme Court by way of an order to review : *Stephens v. Abrahams*, (1902) 27 V.L.R., 753.

### Appeal as of Right in Federal Cases.

Where an appeal lies from a State Court to the Supreme Court of a State, a like appeal will, as a matter of right, lie to the High Court. In *Roberts v. Ahern*, (1904) 1 C.L.R., at p. 417, Roberts, a post office contractor was convicted in the Court of Petty Sessions at Inglewood, and appealed to the High Court.

The Chief Justice, Sir SAMUEL GRIFFITH, said :—" In this case special leave to appeal was granted by this Court. The decision was, however, a decision given in the exercise of jurisdiction conferred by section 39 of the Judiciary Act, from which an appeal lies to the High Court as of right. The leave, therefore, which was asked for *ex abundanti cautela*, must not be regarded as a precedent for holding that the Court can, or, if it can, will, grant special leave to appeal from a decision of an inferior Court of a State given otherwise than in the exercise of Federal jurisdiction."

An appeal to the High Court from a decision of a Court of Petty Sessions of Victoria exercising Federal jurisdiction in the case of a civil debt recoverable summarily when the sum involved does not exceed £5, may under the Rules of the High Court, Part II., section IV., rule 1, be brought by way of order to review notwithstanding that by section 21 of the Justices Act 1904 (Vict.) in such a case the granting of an order to review is prohibited : *Prentice v. Amalgamated Mining Employees' Association of Victoria and Tasmania*, 15 C.L.R., 235.

The term " federal jurisdiction " means authority to exercise the judicial power of the Commonwealth, within certain limits prescribed. Then " federal jurisdiction " must include appellate jurisdiction as well as original jurisdiction. The whole scheme of the Constitution assumes that the judicial power includes both these grants of power. From the history of the Constitution and the practice in English-speaking countries, it must be taken for granted that the judicial power was known by the framers of the Constitution to include both, and that those framers intended that the judicial power might be exercised by Courts of original jurisdiction or by Courts of appellate jurisdiction. The power to create a Federal Court depends upon the Constitution, section 71. The judicial



power exists as an attribute of sovereignty, and, so far as it is not left to the High Court, it is for the Parliament to say what jurisdiction each Court shall have. Section 71 combined with section 77 (I.) means that the Parliament may establish any Court to be called a Federal Court, and may give it jurisdiction to exercise any judicial power of the Commonwealth, which the Parliament may think fit to confer upon it, either by way of appellate or original jurisdiction. Section 77, sub-sec. (III.) must receive a similar interpretation. Parliament may invest any Court of a State with authority to exercise Federal judicial power, again to the extent prescribed by the Statute. There is nothing to restrict that judicial power to original jurisdiction any more than to appellate jurisdiction. There can be no doubt that Parliament might think fit to invest one Federal Court exclusively with original jurisdiction, another Federal Court with appellate jurisdiction, and another with both. There is nothing to limit that power. Any power that falls within the words 'federal jurisdiction' may be conferred on any Court which Parliament thinks fit to invest with Federal jurisdiction. From all such Courts an appeal lies to the High Court. *Per GRIFFITH, C.J. in Ah Yick v. Lehmert*, 2 C.L.R., at pp. 602-603.

### **The Test of Federal Jurisdiction.**

A Court of Summary Jurisdiction of a State exercises Federal jurisdiction within the meaning of section 39 (2) (d) of the Judiciary Act 1903, if it be necessary in the particular case for the Court to decide any question arising under the Constitution or involving its interpretation. If, however, whether that question is answered rightly or wrongly, the Court answers another question, not arising under the Constitution or involving its interpretation, and their answer to that other question enables them to decide the case, the Court does not exercise Federal jurisdiction, and therefore no appeal lies to the High Court from that decision.: *Miller v. Haweis*. 5 C.L.R., 89.

It was held by the Full Court of Tasmania that the question whether the Licensing Act of that State is a proper exercise of the police powers of the State is a question involving the interpretation of the Constitution, and that such a question, being one of Federal jurisdiction, cannot be determined by a Court of Summary Jurisdiction not constituted in accordance with paragraph (d) of this section: *Conlan v. Watts*, (1911) 7 Tas. L.R., 40.

**State Procedure in Federal Jurisdiction.**

The Federated Saw Mill and General Wood-workers' Employees' Association (Adelaide Branch), which was registered as an organization under the provisions of the Commonwealth Conciliation and Arbitration Act 1904, proceeded against John James Alexander, by complaint, in a Court of Summary Jurisdiction constituted by a Special Magistrate of South Australia at Adelaide, to recover £1 19s. 1d., as being the amount of levies and dues alleged owing by the defendant to them in respect of a period beginning before 23rd September 1910, and extending to the date of the complaint, 26th September 1911.

By the rules of the Association it was provided that—"no member shall discontinue his membership without giving at least three months' previously written notice to the Secretary of his intention so to do, nor without paying all membership subscriptions and dues owing by him to the Association." By rule 19 no person could cease to be a member unless he gave at least 3 months' notice to the secretary and paid all fees owing by him to the Association. On the 23rd June 1910 the defendant sent a written notice of his resignation of membership to the secretary of the Association, and he admitted at the hearing that he was a member until 23rd September 1910, and that he then owed 15s. 9d. for levies and dues. By the Judiciary Act 1903, section 39 (2), the several Courts of the States within their respective jurisdictions have authority to hear and determine cases arising under Federal Statutes. The South Australian Justices Act 1850, section 10, provides that "in all cases where no time is already, or shall hereafter be, specially limited for making" any complaint before a Justice "such complaint shall be made . . . within six calendar months from the time when the matter of such complaint . . . arose."

The Magistrate dismissed the complaint on the ground that the claim was barred by the time limit section. Upon appeal to the High Court the decision of the Magistrate was affirmed. Where, by a Commonwealth Statute a new jurisdiction is conferred upon a State Court, the State Court is to be taken as it is found, with all its limitations as to jurisdiction, unless otherwise expressly declared. The provisions of the State law relating to procedure and limitations of actions and claims must prevail. It was further held that a person who had been a member of such an association was not liable for

levies and dues made by the association after the expiration of three months from the time when he gave written notice of his intention to discontinue his membership: *Federated Saw Mill, Timberyard and General Woodworkers' Association (Adelaide Branch) v. Alexander*, (1912) 15 C.L.R., 308.

#### **Time Limit.**

The provisions in section 2 of the Second Schedule to the Commonwealth Workmen's Compensation Act 1912 that the decision of a County Court (which term includes a District Court) shall be final unless within a prescribed time either party appeals to the High Court or the Supreme Court of the State in which the County Court is situated, is an exception from the appellate jurisdiction of the High Court within the meaning of section 73 of the Constitution; and, therefore, no appeal having been brought within the prescribed time, the High Court has no jurisdiction to grant special leave to appeal from such a decision. It was so held by GRIFFITH, C.J., and BARTON, ISAACS, HIGGINS and POWERS, JJ. (RICH, J. doubting): *The King v. Murray & Cormie; Ex parte The Commonwealth*, F.C. (1916) 22 C.L.R., 437.

#### **Matter Pending in High Court.**

In any matter pending in the High Court, not being a matter in which the High Court has exclusive jurisdiction, the Supreme Court of a State shall, subject to any Rules of Court, be invested with Federal jurisdiction to hear and determine any applications which may be made to a Justice of the High Court sitting in Chambers. Such jurisdiction may be exercised by a single Judge of the Supreme Court sitting in Chambers, and the order of the Judge shall have the effect of an order of a Justice of the High Court sitting in Chambers. From any judgment of the Supreme Court of a State given or pronounced in the exercise of Federal jurisdiction in a matter pending in the High Court, an appeal as of right lies to the High Court: Judiciary Act (1903-1910), section 35 (1) (c).

#### **Mandamus, Prohibition and Injunction.**

The extraordinary remedies provided by the Constitution section 75 (v.) in the shape of writs of mandamus, prohibition and injunction directed to officers of the Commonwealth do not come within the meaning of the appellate jurisdiction of the High Court: they belong to the original jurisdiction. The difference is important.

Matters within the appellate jurisdiction are subject to exceptions and regulations whilst those matters within the original jurisdiction cannot be abridged or qualified by Commonwealth legislation : *The King v. Commonwealth Court of Conciliation and Arbitration ; Ex parte Brisbane and Adelaide Tramway Authorities*, (1913) 18 C.L.R., 55.

But the High Court can also grant these remedies in other cases within the appellate jurisdiction : *Ah Yick v. Lehmert*, 2 C.L.R., at pp. 602.

### **Removal of Constitutional Causes.**

By the Judiciary Act 1903, section 40 (1) (2), any cause or part of a cause arising under the Constitution or involving its interpretation which is at any time pending in any Court of a State *on appeal*, may at any stage of the proceedings before final judgment be removed into the High Court under an order of the High Court, which may, for special cause shown, upon application by any party, or by or on behalf of the Attorney-General of the Commonwealth or of a State, be made on such terms as the Court thinks fit. When any such order for removal is made, the proceedings in the cause and such documents if any, relating thereto as are filed of record in the Court of the State, or if part only of the cause is removed a certified copy of those proceedings and documents, shall be transmitted to such Registry of the High Court as is directed by the order. By the Judiciary Act, No. 8 of 1907, section 4, this section was amended by omitting the words "on appeal" thus considerably enlarging the power of removal.

By the Judiciary Act, No. 8 of 1907, section 5, the following new section was added to section 40 (1) :—" 40A. (1) When, in any cause pending in the Supreme Court of a State, there arises any question as to the limits *inter se* of the constitutional powers of the Commonwealth and those of any State or States, or as to the limit *inter se* of the constitutional powers of any two or more States, it shall be the duty of the Court to proceed no further in the cause, and the cause shall be by virtue of this Act, and without any order of the High Court, removed to the High Court."

### **Trial of Indictable Causes.**

By the Act, No. 8 of 1907, section 6, it is provided that, where the trial of any person for an indictable offence against the law of

the Commonwealth or of a State is removed from any Court of a State into the High Court, the trial in the High Court shall be, as nearly as may be, according to the course and practice of the Court from which the trial was removed ; and to that end the laws of the State relating to the trial and conviction of persons charged with indictable offences against the laws of the State shall extend and apply to the trial as if the trial were proceeding in the Court of the State.

### **The Power of Removal.**

The power of removal of Federal cases from State Courts to the Federal Supreme Court has been largely adopted in the judicial system of the United States. It has been held there that Congress has an unquestionable right to remove all cases, within the scope of the judicial power, from the State Courts to the Courts of the United States at any time before final judgment, though not after final judgment ; *per* STORY, J., in *Martin v. Hunter's Lessee*, 1 Wheat., 304. This power of removal is not found in express terms in any part of the American Constitution ; it is only given by implication as a power necessary and proper to carry into effect some express power. It pre-supposes an exercise of original jurisdiction elsewhere ; it is familiar in Courts acting according to the course of common law, in criminal as well as in civil cases. In both cases, it is always deemed to be an exercise of appellate and not of original jurisdiction. A writ of error is but a process which removes the record of one Court to the possession of another, which is thereby enabled to inspect the proceedings, and give such judgment as law and justice may warrant.

### **Appeal in Commonwealth Indictable Cases.**

Where any person is indicted for an indictable offence against the laws of the Commonwealth, the Court before which he is tried shall on the application of the accused person, made before verdict, and may in its discretion either before or after judgment, reserve any question of law which arises on the trial, for the consideration of the Full Court of the High Court, or of a Full Court of the Supreme Court of the State, in which the trial takes place. Except as aforesaid, and except in the case of error, apparent on the face of the proceedings, an appeal shall not without the special leave of the High Court, be brought to the High Court from a judgment or sen-

tence pronounced on the trial of a person, charged with an indictable offence against the laws of the Commonwealth: Judiciary Act 1903-1910, section 77.

§ 127. "SUPREME COURT OF A STATE."

LEGISLATION.

JUDICIARY ACT 1903-1910, Section 35.

**Appeals as of Right.**

The High Court has appellate jurisdiction with respect to judgments of the Supreme Court of a State or of any other Court of a State from which at the establishment of the Commonwealth an appeal lay to the Queen in Council, in the following cases and matters; viz.:—

- (a) Every judgment, whether final or interlocutory, which—
  - (1) is given or pronounced for or in respect of any sum or matter at issue amounting to or of the value of Three hundred pounds; or
  - (2) involves directly or indirectly any claim, demand or question, to or respecting any property or any civil right amounting to or of the value of Three hundred pounds; or
  - (3) affects the status of any person under the laws relating to aliens, marriage, divorce, bankruptcy, or insolvency; but so that an appeal may not be brought from an interlocutory judgment except by leave of the Supreme Court or the High Court:
- (b) Any judgment, whether final or interlocutory, and whether in a civil or criminal matter, with respect to which the High Court thinks fit to give *special leave to appeal*:
- (c) Any judgment of the Supreme Court of a State given or pronounced in the exercise of Federal jurisdiction in a matter pending in the High Court:

It has been held by the High Court in a number of cases that the words "Supreme Court of a State" in section 73 of the Constitution are used to designate the Court which at the time of the establishment of the Commonwealth was, in any particular State,

known by the name of " the Supreme Court " of that State. Therefore an order made by a Judge of the Supreme Court of New South Wales, sitting in Chambers in the exercise of the jurisdiction conferred by section 107 of the Justices Act 1902 of that State, is a judgment of the Supreme Court from which an appeal will lie to the High Court: *Saunders v. Borthistle*, (1904) 1 C.L.R., 379. Therefore, also, an order made by a Judge of the Supreme Court of Victoria, sitting in Chambers upon an originating summons, by which the rights of the parties under a will are finally decided, is an order from which an appeal will lie to the High Court, inasmuch as such an order is, by the Statute law of the State, an order of the Supreme Court: It was held, therefore, that, subject to the conditions mentioned in section 73, an appeal lies to the High Court from " every judgment, decree, order, or sentence " which, according to the law of a particular State, is a " judgment, decree, order or sentence " of the Supreme Court of that State. The conditions imposed by section 35 of the Judiciary Act 1903 on appeals to the High Court from " judgments, decrees, orders, or sentences of the Supreme Court of a State are exhaustive ": *Parkin v. James*, (1905) 2 C.L.R., 315.

Where, under the practice of the State Supreme Court (Queensland) the Judge at *Nisi Prius* has power, after verdict and argument on motion for judgment, to draw all necessary inferences of fact not inconsistent with the findings of the jury, and enter judgment for either party, an appeal lies direct to the High Court without the necessity of an intermediate appeal to the Full Court of the State: *Buchanan v. Byrnes*, (1906) 3 C.L.R., 704.

A decision of a Judge of the Supreme Court of Victoria on an interpleader summons under Order LVII. of the Rules of the Supreme Court of that State is a judgment of the Supreme Court from which an appeal will lie to the High Court: *O'Connor v. Quinn*, (1911) 12 C.L.R., 239.

But it has been held that the Supreme Court upon which jurisdiction is conferred by the Electoral Act (1904) of Western Australia is a special electoral tribunal, and is not the Supreme Court of the State of Western Australia, and that therefore an appeal will not lie from that tribunal to the High Court: *Holmes v. Angwin*, (1906) 4 C.L.R., 297. Certain arbitral jurisdiction conferred on a Judge of the Supreme Court of South Australia by the Land Clauses Consolidation Act 1881 of that State is conferred

not upon the Supreme Court of the State but upon a Judge of the Supreme Court as a *persona designata* with a right of appeal to the Full Court and therefore a judgment of a Judge exercising the jurisdiction so conferred is not a judgment of the Supreme Court from which an appeal will lie to the High Court: *MacDonald v. South Australian Railways Commissioners*, (1911) 12 C.L.R., 221.

#### **Any Sum or Matter.**

A litigant in a suit in the Supreme Court of a State, dissatisfied with any judgment, decree, or order, final or interlocutory, given or pronounced in the exercise of Federal jurisdiction or otherwise, for or in respect of any sum or matter at issue amounting to, or of the value of £300, has the right of appeal to the High Court. The form of words used in section 35 (a) (1) corresponds with the form of words to be found in the Orders in Council giving the right of appeal, in certain cases, to the Privy Council from the Supreme Courts of the Australian Colonies. There are, however, two points of difference the one being that there can be an appeal to the Privy Council only from final judgments decrees or orders and the other that the sum or matter at issue must be of the value of £500 and upwards.

#### **Appealable Amount.**

An action was brought in the Supreme Court of Victoria by a remainderman asking for a declaration that the trustees were liable to keep in repair and maintain certain property valued at £2,000, and buildings and fences thereon valued at £300 during the life of the tenant for life. It was held by the High Court that a judgment of the Supreme Court of that State refusing any relief was a judgment which involved a claim, demand, or question to or respecting property amounting to or of the value of £300 within the meaning of this paragraph, and that an appeal to the High Court lay without leave: *Amos v. Fraser*, (1906) 4 C.L.R., 78.

The measure of the appealable amount is the value of the appellant's interest in the property or civil rights. *Per O'CONNOR, J.* (High Court), *Amos v. Fraser*, (1906) 4 C.L.R., 78.

It has been held by the High Court that a judgment of the Supreme Court of Tasmania dismissing an application to expunge a trade mark of the value of £300 from the register is a final judgment from which an appeal lies to the High Court without leave: *Ashton & Parsons Ltd. v. Gould*, (1909) 7 C.L.R., 598.



In an affidavit under the High Court Rules 1903, Part II., Section 3, rule 7 (a), as to the appealable nature of a judgment, the statement that the judgment involves indirectly a question respecting property of the value of £300 is, in the absence of evidence to the contrary, a sufficient statement of the value: *Ashton & Parsons Ltd. v. Gould*, (1909) 7 C.L.R., 598.

The High Court has held that in ascertaining the appealable amount under the Judiciary Act 1903, section 35, in the case of a plaintiff who has failed in the Supreme Court of Victoria and seeks to appeal to the High Court the test is the amount of the sum which he has claimed and failed to recover. So where a plaintiff obtained a judgment in the Supreme Court for £600, which on appeal to the Full Court was reduced to £500, it was held that for the purposes of his appeal to the High Court the adverse judgment was in respect of £100 only, and that an appeal would not lie without leave: *Jenkins v. Lanfranchi*, (1910) 10 C.L.R., 595.

A plaintiff brought an action in the Supreme Court of Western Australia for a declaration of right to a strip of land, having upon it a wall, over which the defendant claimed an easement of support for the beams supporting the upper floor of his adjoining building. He also claimed a mandatory injunction and damages. The land and wall were worth £290, and the plaintiff had suffered actual damage to the extent of £15. It was held by the High Court that the judgment was one involving a claim respecting property amounting to or of the value of £300 within the meaning of this paragraph: *Milne v. James*, (1910) 13 C.L.R., 165.

On a rule *nisi* for probate of a will in respect of property amounting in value to over £1,000, it appeared that the interest of the caveator, one of three sons of the testatrix, none of whom took any benefit under the will, would on an intestacy have amounted to less than £300. The Supreme Court of Victoria having decided in favour of the validity of the will, it was held by the High Court that the judgment was one for or in respect of a matter at issue of the value of over £300: *Tipper v. Moore*, (1911) 13 C.L.R., 248.

### **Claim Indirectly Involved.**

As to whether special leave to appeal is necessary when the judgment of a State Supreme Court *indirectly involves* a sum amounting to or of the value of £300, see *Markell v. Lockyer*, (1905) 11 A.L.R., 485.

**Status—Marriage—Divorce.**

An order of the Judge in divorce under section 4 of the New South Wales Matrimonial Causes Act 1899, awarding the husband (the successful petitioner in a suit for dissolution of marriage) the custody of a child of the marriage, is not a judgment which affects the status of any person under the laws relating to divorce, within the meaning of this section : *Daniel v. Daniel*, (1906) 4 C.L.R., 563.

**Interlocutory Judgments.**

No unqualified right of appeal is given from an interlocutory judgment pronounced by a State Supreme Court whether acting solely in its capacity as a State Court or in the exercise of Federal jurisdiction even if the money issue, property, or civil right involved exceeds in value £300. The Supreme Court is, however, authorized to grant leave to appeal against such a judgment to the High Court, or the High Court itself may grant leave to appeal.

Under the Judiciary Act 1903, section 35 (a) an appeal from an interlocutory judgment (refusal to grant a commission to examine witnesses abroad) may be brought to the High Court by leave only and without special leave under section 35 (b) in every case in which there would be an appeal to that Court as of right from the final judgment in the action or suit in which the interlocutory judgment was given : *Willis v. Trequair*, (1906) 3 C.L.R., 912. A rule absolute setting aside a non-suit and granting a new trial is an interlocutory judgment. *Per PRING, J.*, Supreme Court of New South Wales in *McKeon v. Miller*, (1905) 22 W.N. (N.S.W.), 22.

**Special Leave to Appeal in Civil Cases.**

In considering application for special leave to appeal in civil cases below the appealable amount the High Court has decided that it will substantially follow the rule laid down by the Privy Council in the case of *Prince v. Gagnon*, 8 A.C., 103, at p. 105 ; that leave will only be given where the case is of gravity, involving matter of public interest, or some important question of law, or affecting property of considerable amount, or where the case is otherwise of some public importance or of a very substantial character : *Hannah v. Dalgarno*, (1903) 1 C.L.R., 1 ; *Backhouse v. Moderna*, (1904) 1 C.L.R., 675.

In dealing with an application for special leave to appeal, the High Court adopted the rule laid down by Lord WATSON in *La Cite*

*de Montreal v. Les Ecclesiastiques du Seminaire de St. Suplice de Montreal* (14 A.C., 660, at p. 662), that a case must be of a substantial character, may involve matter of great public interest, and may raise an important question of law, and yet the judgment from which leave to appeal is sought may appear to be plainly right or at least to be unattended with sufficient doubt to justify their Lordships in advising Her Majesty to grant leave to appeal : *Norton v. Taylor*. (1905) 2 C.L.R., 291.

The High Court will not grant special leave to appeal in cases which do not raise questions of general importance likely to arise in the future, or (in general) in cases depending upon the terms of particular documents : *Baxter v. New South Wales Clickers' Association*, (1909) 10 C.L.R., 114. It will not be granted where the questions involved are mere questions of fact, nor, even in a case involving an important question of law, if the judgment from which leave to appeal is sought appears to the Court to be unattended with sufficient doubt to justify the granting of leave : *Johansen v. City Mutual Life Assurance Society Ltd.*, (1905) 2 C.L.R., 186. It will not be granted where there is no reason to doubt the correctness of the decision from which it is desired to appeal : *Manton v. Williams*, (1907) 4 C.L.R., 1046 ; *Resch's Ltd. v. Allan*, (1911) 13 C.L.R., 194. It will be refused where the decision is manifestly right : *Rae v. Simmons*, (1910) 11 C.L.R., 246 ; *Waterhouse v. The King*, (1911) 13 C.L.R., 228 ; *Hey v. Brookes*, (1911) 13 C.L.R., 219. It will be refused where a very small amount is involved, and where the appellant has lain by in the lower Court and taken the chance of a judgment in his favour : *Zimpel v. Allard*, (1904) 2 C.L.R., 117. In cases where the sum involved is much below the appeal limit. it will be refused even though the judgment of the Supreme Court appears to be erroneous, if the error has arisen from a wrong inference of fact, or from a wrong application to the facts of a well-known rule of law : *Learmonth v. Atkinson*, (1905) 11 A.L.R., 287. It will be refused where the matter to be decided is purely a question of facts : *Murray v. Munro*, (1906) 3 C.L.R., 788 ; *Dwyer v. Vindin*, (1906) 4 C.L.R., 216 ; *Cameron v. Irwin*, (1908) 5 C.L.R., 856 ; *Jones v. Gedye*, (1909) 9 C.L.R., 262. It will be refused where the amount involved is very small, while the case raises a very difficult question of law : *Bagnall v. White*, (1906) 4 C.L.R., 89.

But in some circumstances leave to appeal will be given as a matter of course : *Wilcox v. Donohoe*, (1905) 3 C.L.R., 83. In some

cases it will be granted on a condition : *a' Beckett v. Backhouse*, (1907) 4 C.L.R., 1334. Where costs are in the discretion of the Supreme Court, special leave to appeal as to costs alone will only be granted in very special circumstances : *Jenkins v. Lanfranchi*, (1910) 10 C.L.R., 595. See also *O'Sullivan v. Morton*, (1911) 12 C.L.R., 390. In *MacDonald v. Beare*, (1904) 1 C.L.R., 513, a motion to rescind special leave to appeal was dismissed on the ground that the question involved was of great public importance, and that on it depended the liability or non-liability of the appellant to a number of actions. In *Donohoe v. Britz*, (1904) 1 C.L.R., 391, it was held that the fact that the question raised was an important question of law, and of general interest to the mercantile community, was an adequate reason for granting special leave to appeal.

### Habeas Corpus.

The High Court has jurisdiction to entertain an appeal from the Supreme Court of a State in the case of *habeas corpus*. In that case GRIFFITH, C.J. said :—" We have no doubt as the jurisdiction of the High Court to entertain this appeal. The jurisdiction conferred by the Constitution extends to all decisions of the Supreme Courts of the States with such exceptions as may be made by Parliament, and no exception is made by the Judiciary Act in the cases of *habeas corpus* : *Attorney-General for the Commonwealth v. Ah Sheung* (29th of June 1906), 4 C.L.R., 949.

Where a person is detained in a State gaol under a sentence of a State Court, the High Court has no jurisdiction to order him to be allowed to come before the High Court in order that he may personally apply for leave to appeal from a judgment of a Court of that State. Mandamus will not lie to the Governor in Council of a State, and no Court has jurisdiction to review his discretion in the exercise of the prerogative of mercy. Where a writ of *habeas corpus*, which had been obtained by a prisoner alleging that he was entitled to his liberty under regulations made pursuant to section 540 of the Crimes Act 1890 (Vict.), had been discharged by the Supreme Court, special leave to appeal was refused : *Horwitz v. Connor*, 6 C.L.R., 38.

### New Trial.

The Judiciary Act 1903-1910, section 2, declares that an appeal includes an application for a new trial and any proceedings to review or call in question a decision or jurisdiction of any Court or Judge. Section 36 states that in the exercise of its appellate

jurisdiction, the High Court shall have power to grant a new trial in any cause in which there has been a trial with or without a jury. Parliament, however, cannot by definition enlarge the meaning of the term "appeal" as understood in the Constitution. See Notes, *infra*, "Appeal from Verdict of Jury."

### **Appeals from Verdicts of Civil Juries Refused.**

An appeal does not lie to the High Court of Australia from the verdict of a jury or from a judgment of the Supreme Court of a State founded upon the general verdict of a jury in a civil case except by way of appeal from a decision of the Supreme Court on an application for a new trial. An application for a new trial after verdict, upon whatever ground, does not fall within the words of the Constitution, section 73, "appeals from all judgments decrees orders and sentences" of Federal Courts or State Courts: *Musgrove v. McDonald*, (1905) 3 C.L.R., 132.

Nine months afterwards, the High Court similarly constituted in the case of *Baume v. The Commonwealth*, 4 C.L.R., at p. 97 which arose in the Federal jurisdiction, qualified the decision in *Musgrove v. McDonald*. That case was a motion in the High Court for a new trial after a jury verdict in favour of the Commonwealth on certain issues, by direction of the Chief Justice of New South Wales (Sir FREDERICK DARLEY). A preliminary objection was taken that the High Court had no jurisdiction to entertain an application for a new trial after a verdict of a jury and *Musgrove v. McDonald* was relied on. The Chief Justice (Sir SAMUEL GRIFFITH), said:—"We do not think that *Musgrove v. McDonald* covers the present case. That turned entirely on the right of appeal given by the Constitution. We are of opinion that the High Court has power to make an order directing a new trial after a verdict of a jury in the Supreme Court exercising delegated Federal jurisdiction under the Judiciary Act 1903, section 39 (2)."

In *The King v. Snow*, (1916) 20 C.L.R., 315, in which six Justices of the High Court took part, reference was made to the apparent conflict between the two above-named decisions.

The Chief Justice said:—"In *Musgrove v. McDonald*, this Court, in a considered judgment, unanimously held that the jurisdiction conferred on the High Court by section 73 to entertain appeals from 'judgments, decrees, orders and sentences' did not

include jurisdiction to entertain, under the name of an appeal from a final judgment, an application for a new trial in a civil action after the verdict of a jury. I need not repeat the arguments (to a great extent historical) on which this conclusion was based. I will only say that the lapse of years has confirmed my opinion as to their soundness. They are not less applicable to criminal cases. *Baume's Case*, which was not a considered judgment, proceeded, in my opinion, upon a misconception of the effect of section 2 of the Judiciary Act, definition of appeal to include new trial. In my opinion, when the proceedings upon an indictment have been concluded by verdict followed by judgment, the Court cannot, under the British system of criminal law, unless expressly authorized by Statute, examine the validity of the proceedings except so far as they appear on the record."

Mr. Justice ISAACS, said :—" The case of *Musgrove v. McDonald* is relied upon for the position that on an appeal from a judgment the verdict of a jury cannot be attacked, but must, in all cases, be accepted as correct. One answer may be made on the instant. In *Baume v. The Commonwealth*, it was solemnly decided by the same Court that had previously decided *Musgrove v. McDonald*, and with equal unanimity, that where a State Court was exercising Federal jurisdiction the same rule does not apply, but that this High Court has jurisdiction to entertain even a motion for new trial. *A fortiori* it must have jurisdiction to entertain an appeal from the judgment for a reason going to the very foundation of the judgment. Upon that decision no doubt the Crown has relied in this case, and no doubt Parliament has relied upon it in continuing to entrust Federal jurisdiction of such enormous importance to State Courts. If *Baume's Case* is to be adhered to, it is an absolute answer to the respondent's objection. If every recorded decision on the Constitution is to be regarded as binding until a statutory majority of this Court determines it to be wrong—though it may be the judgment of a single Judge—and notwithstanding an equal division of opinion in the Court as constituted, then *Baume's Case* must, until so overruled, be accepted as governing this case, because the present case is one of Federal jurisdiction. But, independently of that, we have here, as a Full Bench, the obligation of considering for ourselves the accuracy of *Musgrove's Case*. If it is to be taken as correct in the extreme view it is said to present, then, whenever a Federal indictment is tried before a State Court, it is

well to understand the constant risk of Justice being entirely defeated on one side or the other. But is *Musgrove's Case* correct? That decision is supposed to be supported to that extent by the Privy Council case of *Tronson v. Dent*. A careful examination of that case, however, which in this Full Bench we are bound to make, particularly as it is the decision of the Judicial Committee, will show that it does not support so sweeping a proposition."

Mr. Justice HIGGINS said :—" I can only say that if I am compelled to choose between *Musgrove v. McDonald* and *Baume v. The Commonwealth*, I think that the latter, the more recent decision, is sounder in result. I am of opinion that where, at all events, this Court finds that there has been such a mistrial as in the present case—where it finds that the alleged trial was a fiasco, that the accused has not really been tried for the offence alleged, this Court has power to grant special leave to appeal from the judgment, and to correct all that has been done under the mistake of law."

Mr. Justice GAVAN DUFFY and Mr. Justice RICH, said :—" We must next consider whether an appeal lies from the judgment which followed the verdict. In form we think it does, for such a judgment is undoubtedly within the words of the Constitution and of the Judiciary Act 1903, but the substantial question is whether this Court could, on the appeal, make any order in favour of the Crown; if it could not, special leave should be refused. This Court cannot, on an appeal from a judgment, either set aside the verdict on which the judgment is founded, or ignore it. If the verdict is wrong, it must either be set aside by means of an application to the Court in which it was obtained, or, if no power exists to set it aside by such means, it must stand with all its consequences."

Mr. Justice POWERS said :—" After carefully considering other cases, particularly *Baume v. The Commonwealth*, I have come to the conclusion that the judgment in *Musgrove v. McDonald* does not prevent this application being granted, because the same Judges, in a Full-Court decision nine months later, in *Baume's Case* qualified their decision in *Musgrove's Case*, by holding that this Court has jurisdiction to entertain a motion for a new trial after the verdict of a jury in the Supreme Court of a State exercising Federal jurisdiction under section 39 of the Judiciary Act 1903."

**New Trial—Jury—Mis-direction.**

An action was brought in the Supreme Court of New South Wales in its Federal jurisdiction by the Brisbane Milling Co. Ltd. against the Commonwealth to recover damages for breach of contract. The jury having found a verdict for the plaintiff, the Commonwealth, within the time limited for serving notices of motion for new trials, filed in the High Court and served a notice stating that they appealed to the High Court against so much of the verdict of the jury as awarded damages, and that the High Court would be moved by way of appeal to set aside the finding of the jury for the sum awarded and to enter a verdict for the plaintiff for nominal damages or to grant a new trial. The grounds stated, were, substantially, that the damages should have been nominal and the Judge should have so directed the jury, and that if the damages should not have been nominal those awarded were excessive. Thereafter, and before security was given by the Commonwealth for the prosecution of the appeal to the High Court, final judgment in the Supreme Court was signed. It was held by GRIFFITH, C.J., and BARTON, HIGGINS, GAVAN DUFFY and RICH, JJ. (ISAACS and POWERS, JJ., dissenting), that the High Court had no jurisdiction to entertain the matter either as an appeal or as a motion for a new trial. *The King v. Snow*, 20 C.L.R., 315, followed: *The Commonwealth v. The Brisbane Milling Co. Ltd.*, F.C., (1916) 21 C.L.R., 559.

The whole question of appeals and new trial applications was finally reviewed by the High Court in this case. There a preliminary objection was taken in the High Court that an application by way of appeal for a new trial after verdict of a jury in an action pending in the Supreme Court of a State does not lie to the High Court, and in support of the objection the case of *Musgrove v. McDonald* was cited. That case, which was a considered judgment of the whole Court as then constituted, could not be distinguished from the present case unless the fact that in this case the Supreme Court was exercising Federal jurisdiction was a valid ground of distinction. The appellants relied on the case of *Baume v. The Commonwealth* (2), which was also an action in the Supreme Court of New South Wales exercising Federal jurisdiction, and in which the High Court allowed the validity of the distinction.

“Both these decisions,” said the Chief Justice, “were expressed by my mouth. In the case of *R. v. Snow*, three members of the



Court expressed the opinion that the first case was rightly, and the second wrongly, decided. I pointed out that *Baume's Case*, which was not a considered judgment, had proceeded upon a manifest misapprehension of the effect of section 2 of the Judiciary Act. I will now state at length my reasons for adhering to this opinion."

The Chief Justice then went on to point out that every decision of the Supreme Court of a State, in Federal jurisdiction, is final and conclusive except so far as an appeal may be brought to the High Court: Judiciary Act, section 39 (2) (a). The interpretation section 2 of the same Act provides that in that Act unless the contrary intention appears the word "appeal" includes an application for a new trial. In *Baume's Case* the Court seems to have assumed that this definition applied to section 39 (2) (a). They, therefore, read the provision as "except so far as an appeal or application for a new trial may be brought to the High Court," which was probably an erroneous construction, and then fell into the further error of construing this last phrase as equivalent to "except that an application for a new trial may be brought to the High Court," so converting it from a statement of an exception into a positive enactment conferring jurisdiction. "Section 39," said the Chief Justice, "was not intended to enlarge the right of appeal. The words 'except so far as an appeal' from the decision 'may be brought to the High Court' are apt words to express the intention, and merely mean 'except so far, if at all, as the decision is appealable to the High Court.' For these reasons I think that 'a contrary intention' appears, and that the word 'appeal' as used in sub-section 2 (a) of section 39 does not include an application for a new trial. I am of opinion, therefore, that the reasoning in *Baume's Case* cannot be supported, and that no foundation for the jurisdiction of this Court to entertain the present application is to be found in section 39 (2) (a)."

"The only other suggested foundation for the appeal," said the Chief Justice, "is that an application for a new trial is, in a sense, an appeal. In *Musgrove v. McDonald*, the Court held, and stated at length its reasons for holding, that it is not an appeal within the meaning of section 73 of the Constitution. I adhere to my opinion expressed in *Snow's Case*, that this case was well decided. The appellate jurisdiction of this Court is conferred by the Constitution, and cannot be added to by the Parliament. The

Parliament could not, therefore, even if it had attempted to do so, have conferred upon the High Court the jurisdiction sought to be invoked. It follows that *Baume's Case* was wrongly decided and should be overruled, and the preliminary objection allowed. This appeal must, therefore, be dismissed as incompetent": 21 C.L.R., at pp. 563-565.

Mr. Justice BARTON and Mr. Justice HIGGINS agreed that there could not be an appeal from a verdict which is an act of a jury. Under the Constitution there could only be an appeal from the judgment of a Court. Mr. Justice DUFFY and Mr. Justice RICH agreed with the Chief Justice. Mr. Justice ISAACS and Mr. Justice POWERS, held that an appeal was competent and should be entertained.

The Court, by a majority, overruled *Baume v. The Commonwealth*, 21 C.L.R., at pp. 566-582.

### **Leave to Appeal.**

The Judiciary Act in defining exceptions differentiates between "leave to appeal" and "special leave to appeal." Thus an appeal may not be brought from an interlocutory judgment in the Supreme Court of a State except by leave of the Supreme Court or the High Court: Judiciary Act 1903-1910, section 35 (1) (a) (3).

### **Special Leave to Appeal.**

No appeal may be brought to the High Court in criminal cases or in civil cases not within the meaning of section 35 (1) (a) (1), (2) and (3), unless the High Court thinks fit to grant "special leave to appeal." The High Court may grant special leave to appeal to the High Court from any decision of any Court or Judge of a State in Federal jurisdiction notwithstanding that the law of the State may prohibit any appeal from such Court or Judge.

### **Special Leave to Appeal in Criminal Cases.**

In dealing with applications for special leave in criminal cases the High Court has adopted the principle laid down by the Privy Council in *re Dillet* (12 A.C., 459, at p. 467), that special leave to appeal will not be granted unless it is shown that, by a disregard of the forms of legal process, or by some violation of the principles of natural justice, or otherwise, substantial and grave injustice has been done: *Bataillard v. The King*, (1907) 4 C.L.R., 1282; *McGee*

*v. The King*, (1907) 4 C.L.R., 1453; *The King v. Neil*, (1909) 8 C.L.R., 671; *Hope v. The King*, (1909) 9 C.L.R., 257.

Special leave will be granted in criminal cases only where questions of great public importance are involved: *Connolly v. Meagher*, (1906) 3 C.L.R., 682; *Millard v. The King*, (1906) 3 C.L.R., 827. It will not be granted from a decision of the Supreme Court quashing a conviction on a Crown case reserved, on the ground that the point upon which the decision went was not one of those specifically reserved at the trial, if that point appears clearly on the face of the case stated. *Per* GRIFFITH, C.J., *Attorney-General of New South Wales v. Jackson*, (1906) 3 C.L.R., 730. It will not be granted where the accused who had been acquitted in the Court below, is at most only technically guilty of the offence charged: *Connolly v. Meagher*, (1906) 3 C.L.R., 682. Nor on questions of fact: *Bataillard v. The King*, (1907) 4 C.L.R., 1282; *Collis v. Smith*, (1909) 9 C.L.R., 490; *Soby v. Levy*, (1909) 9 C.L.R., 497.

In granting special leave to appeal in criminal cases the High Court will follow the practice of the Judicial Committee of the Privy Council, as expounded in *Ibrahim v. The King*, (1914) A.C., 599, and *Arnold v. The King-Emperor*, (1914) A.C., 644. So held by GRIFFITH, C.J., and BARTON, GAVAN DUFFY, POWERS and RICH, JJ. (ISAACS, J., dissenting): *Eather v. The King*, 20 C.L.R., 147.

#### Rule Re-stated.

In *Re Eather v. The King*, (1915) 20 C.L.R., 147, an application was made for leave to appeal against a conviction for assaulting a girl which conviction had been confirmed by the Court of Criminal Appeal in New South Wales. The majority of the High Court, GRIFFITH, C.J., BARTON, GAVAN DUFFY, POWERS and RICH, JJ. (ISAACS, J. dissenting) refused to grant leave.

The Chief Justice, Sir SAMUEL GRIFFITH said:—"We are of opinion that in granting special leave to appeal in criminal cases this Court should follow the practice of the Judicial Committee. That practice has lately been very fully expounded in the cases of *Ibrahim v. The King*, and *Arnold v. The King-Emperor*. We are also of opinion, upon examination of the facts of the present case, that it is one which, according to that practice, leave should not have been given."

Mr. Justice ISAACS delivered an elaborate judgment dissenting from the limitation of the discretion of the High Court involved in following the "artificial rules" laid down by the Privy Council: 19 C.L.R., at p. 413.

Subsequently (19th June, 1915), the Chief Justice (Sir SAMUEL GRIFFITH) made the following statement from the bench:—"Since the decision of the Court in *Eather v. The King*, it has been ascertained that the real practice as formulated in that case is interpreted by the members of the Court in different senses. The case, cannot therefore, for the future be regarded as an authority. As we interpret the Judiciary Act, section 35 (1) (b), the Court has an unfettered discretion to grant or refuse special leave in every case, but we think that the term 'special leave' connotes the necessity for making a *prima facie* case showing special circumstances. I speak for all the members of the Court, except my brother BARTON, who is absent from the Commonwealth": *Eather v. The King*, 20 C.L.R., 147.

#### Appeal in Criminal Cases after Acquittal by a Jury.

On the trial of Francis Hugh Snow at the Criminal Sessions of the Prison Court of South Australia, before Mr. Justice GORDON and a jury, on a charge of attempting to trade with the enemy contrary to the provisions of the Trading with the Enemy Act 1914, on various dates both before and after the passing of that Act, at the close of the evidence for the Crown the Judge held that the Act was not retrospective as to attempts to trade with the enemy and that, as to the attempts alleged to have taken place after the passing of the Act, there was no evidence to go to the jury. He thereupon directed the jury to find a verdict of "not guilty," which they did, and the accused was discharged. The Crown having applied for special leave to appeal to the High Court from the judgment of acquittal, or, alternatively, from the direction of the Judge, it was held by GRIFFITH, C.J. and GAVAN DUFFY, POWERS and RICH, JJ. (ISAACS and HIGGINS, JJ., dissenting), that special leave to appeal should be refused. By GRIFFITH, C.J., and GAVAN DUFFY and RICH, JJ., as to the judgment of acquittal, on the ground that, although under section 73 of the Constitution the High Court has jurisdiction to entertain an appeal from a judgment discharging an accused person, that section does not confer jurisdiction on the High Court to set aside a verdict of "not

guilty," so that, when, as in this case, the judgment properly followed the verdict, the granting of special leave to appeal would be futile. As to the direction of acquittal, leave was refused on the ground that it was not a "judgment" from which under section 73 an appeal lies to the High Court. POWERS, J. held that, although under section 73 the High Court had jurisdiction to entertain an appeal from the judgment of acquittal, to set aside the verdict and to grant a new trial, the discretion to grant special leave to appeal should not in the circumstances be exercised. ISAACS and HIGGINS, JJ. held that leave might be granted: *Musgrove v. McDonald*, 3 C.L.R., 132, and *Baume v. The Commonwealth*, 4 C.L.R., 97, discussed. Special leave to appeal from the Supreme Court of South Australia (Gordon, J.), refused: *The King v. Snow*, F.C., (1915) 20 C.L.R., 315.

#### § 128. "OF ANY OTHER COURT OF A STATE."

The High Court has held that the words "Judgments . . . of any other Court of a State from which at the establishment of the Commonwealth an appeal lay to the Queen in Council" include judgments from which an appeal lay either with or without special leave of the Privy Council: *Parkin v. James*, (1905) 2 C.L.R., 315. But see, also, *Kamarooka Gold Mining Co. No Liability v. Kerr*, (1908) 6 C.L.R., 255.

#### § 129. "OF THE INTER-STATE COMMISSION."

##### Appeals from Inter-State Commission.

The words of this sub-section giving an appeal to the High Court for the judgments, decrees, orders and sentences of the Inter-state Commission do not necessarily imply that the Commission is a Court exercising judicial functions. The reference in a separate paragraph, section 73 (III.), to the Inter-state Commission, after the exhaustive words of paragraph (II.) which embrace all Courts other than the High Court, to which the High Court appellate jurisdiction extends, indicates that the Commission was not one of the "Courts" within the meaning of "Chapter III, JUDICATURE" of the Constitution. Judicial power is undoubtedly conferred by sub-sections (III.) but that is in the High Court, and the jurisdiction to correct errors of law—similar to that of the English High Court in section 39 of the Act in *Arlidge's Case*, (1915) A.C., 120;—does not connote that the Commission is a Court,

any more than the local Government Board is a Court. First the word "order" applies as much to the order of a *quasi* judicial or administrative body as to a strict Court of law. *Per* ISAACS, J. in the *State of New South Wales v. The Commonwealth*, (1916) 20 C.L.R., at p. 87. See note to section 101.

### § 130. "FINAL AND CONCLUSIVE."

#### Appeals from State Courts.

Notwithstanding section 106 of the New South Wales Justices Act (No. 27 of 1902), which provides that on appeals by way of special case, stated for the opinion of the Supreme Court, the judgment of the Court shall be "final and conclusive," the High Court has jurisdiction, under section 73 of the Constitution, to hear and determine appeals from such judgments. Judgment of the Supreme Court, (1904) 4 S.R. (N.S.W.), 200, reversed; *Peterswald v. Bartley*, (High Court), (1904) 1 C.L.R., 497.

#### Appeal to Queen in Council.

74. No appeal shall be permitted to the Queen in Council from a decision of the High Court upon any question, howsoever arising, as to the limits *inter se* of the Constitutional powers of the Commonwealth and those of any State or States, or as to the limits<sup>131</sup> *inter se* of the Constitutional powers of any two or more States, unless the High Court shall certify that the question is one which ought to be determined by Her Majesty in Council.

The High Court may so certify<sup>132</sup> if satisfied that for any special reason the certificate should be granted, and thereupon an appeal shall lie to Her Majesty in Council on the question without further leave.

Except as provided in this section, this Constitution shall not impair any right which the Queen may be pleased to exercise by virtue of Her Royal prerogative to grant special leave of appeal from the High Court

to Her Majesty in Council. The Parliament may make laws limiting the matters in which such leave may be asked, but proposed laws containing any such limitation shall be reserved by the Governor-General for Her Majesty's pleasure.

§ 131. "AS TO THE LIMITS INTER SE."

LEGISLATION.

. JUDICIARY ACT (1903-1910), Sections 38A and 40A.

**Removal of Constitutional Cases.**

In October 1907, whilst the conflicting decisions of the High Court and the Privy Council in the Federal Income Tax Cases were under consideration the Parliament of the Commonwealth passed an Act amending the Judiciary Act by inserting the following new sections :—" In matters (other than trials of indictable offences) involving any question, however arising, as to the limits *inter se* of the constitutional powers of the Commonwealth and those of any State or States, or as to the limits *inter se* of the constitutional powers of any two or more States, the jurisdiction of the High Court shall be exclusive of the jurisdiction of the Supreme Courts of the States ; so that the Supreme Court of a State shall not have jurisdiction to entertain or determine any such matter, either as a Court of first instance or as a Court of Appeal from an inferior Court " : Judiciary Act 1903-1910, section 38A. " When, in any cause pending in the Supreme Court of a State, there arises any question as to the limits *inter se* of the constitutional powers of the Commonwealth and those of any State or States or as to the limits *inter se* of the constitutional powers of any two or more States, it shall be the duty of the Court to proceed no further in the cause, and the cause shall be by virtue of this Act, and without any order of the High Court, removed to the High Court. Thereupon the proceedings in the cause, and such documents, if any, relating thereto as are filed of record in the Supreme Court of the State, shall be transmitted by the registrar, prothonotary, or other officer of the Court, to the Registry of the High Court in the State ; or if there are more registries than one in the State, to such registry as is prescribed by Rules of Court " : Judiciary Act 1903-1910, section 40A (1), (2).

### The Powers Inter se.

It is a matter for surprise and regret that in the early history of the interpretation of the Constitution that the Parliament of the Commonwealth should have deemed it advisable to reject the services of the Supreme Courts of the States as primary courts in dealing with constitutional cases. Nothing could be suggested against the honor, integrity and ability of the Justices of the Supreme Courts. The fact is that this drastic Federal legislation originated in the manner in which the case of *Webb v. Outtrim*, (1905) V.L.R., 463; 26 A.L.T., 198, was conducted in Victoria by the parties thereto. That was a case involving important constitutional issues referred to elsewhere: *supra*, p. 171.

Mr. T. P. Webb, the Victorian Commissioner of Taxation, sued Mr. Outtrim the Deputy Postmaster-General of Victoria to recover State income tax on his Federal salary. Mr. Outtrim pleaded immunity from State taxation. The case was referred to the Full Court of Victoria which following the ruling in *Deakin v. Webb*, gave judgment for their respondent. By that decision Mr. Outtrim escaped State taxation. But the Commissioner applied to Mr. Justice HODGES for leave to appeal to the Privy Council against that decision. Then was witnessed the unusual spectacle of a successful litigant instead of holding fast to his judgment actually instructing his counsel in Court to consent to the leave being granted. Commonwealth rights were not argued. Under the circumstances Mr. Justice HODGES had scarcely any alternative but to grant the leave applied for. The effect of the leave was to divert the case from the High Court of Australia to the Privy Council. So strong was the impression that there had been some understanding between the parties and that there was a risk of the case not being adequately placed before the Privy Council that the Attorney-General of the Commonwealth intervened and demanded the right to be represented before the Privy Council, which was granted.

The law advisers of the Commonwealth considered that no litigants should be allowed to make arrangements by which constitutional cases might be conducted through channels selected by themselves. There was a certain amount of irritation also caused by Mr. Justice HODGES' description of the Judiciary Act 1903, section 39 (2) (a) as "a devious, circuitous, round-about" method of depriving the King's subjects of their rights under the Order



in Council to appeal direct to the Privy Council. It was never suggested before Mr. Justice HODGES that the sections referred to did not purport or intend to take away the right of an unsuccessful litigant in the Supreme Court to apply to the King in Council for leave to appeal. The criticism mentioned had no material effect in causing the legislation which is at the head of this note ; the main factor was the conduct of the parties.

**§ 132. "THE HIGH COURT MAY SO CERTIFY."**

**Special Reasons for Certificate.**

In two important cases applications made to the High Court for certificates authorizing appeals to the Privy Council under this section were refused. In one case only has a certificate so far been granted: *Attorney-General for the Commonwealth v. Colonial Sugar Refining Co.*, (Privy Council), (1914) 17 C.L.R., 645 (1914) A.C. 237. No general rule can be laid down as to what are special reasons for granting a certificate.

It appears, however, that the principles applicable to the granting by the Privy Council of leave to appeal from the High Court, or from the Supreme Court of a State, are not applicable to the granting by the High Court of a certificate under section 74 of the Constitution.

It has been held that the desire of the Governments of all or some of the States that an appeal to the Privy Council should be allowed ; that the decision affects a large number of persons in many of the States and the revenues of those States ; that the decision reverses a decision of the Supreme Court of a State are not sufficient reasons for granting a certificate : *Deakin v. Webb* ; *Lyne v. Webb*, F.C., 1 C.L.R., 585.

The fact that a decision of the Privy Council, on a question of law as to the limits *inter se* of the constitutional powers of the Commonwealth and the States is contrary to a previous decision of the High Court as to which a certificate under section 74 of the Constitution has been asked and refused, was held not to be of itself a sufficient special reason for granting a certificate as to another decision of the High Court following its previous decision.

The inconvenience caused by the existence of those contrary decisions was held not to be a sufficient reason. *Per* GRIFFITH, C.J.,

O'CONNOR, J. and ISAACS, J.—That inconvenience can be removed by the Commonwealth Parliament exercising its powers under section 77 (II) of the Constitution. *Per* GRIFFITH, C.J.—That inconvenience can also be removed by the Commonwealth Parliament making its grants to its servants subject to the right of the States to tax them. *Per* HIGGINS, J.—*Quære*, whether, if a State income tax on salaries of Federal servants is invalid under the Constitution, the Commonwealth Parliament can validate such a tax: *Flint v. Webb*, F.C., 4 C.L.R., 1178; special leave to appeal refused by Privy Council, (1908) A.C., 214; 5 C.L.R., 398.

In the case of the *Attorney-General of the Commonwealth v. The Colonial Sugar Refining Co.*, (1914) 15 C.L.R., 182, the Judges (the Chief Justice and BARTON, ISAACS and HIGGINS, JJ.) were equally divided in opinion; that of the Chief Justice prevailing, and a certificate was granted in the following form:—

“Pursuant to section 74 of the Constitution this Court doth certify that, so far as the question whether the Parliament of the Commonwealth has power to make laws for the compulsory examination of witnesses by Royal commissions touching matters which are not within the ambit of the existing legislative powers of the Commonwealth, that is to say, such powers as may now be exercised without an amendment of the Constitution under the provisions of section 128, is a question as to the limits *inter se* of the constitutional powers of the Commonwealth and those of any State or States, the question is one which ought to be determined by His Majesty in Council”: 15 C.L.R., at p. 234.

### **Frontier of Commonwealth Power.**

In the *Builders Labourers' Case*, 18 C.L.R., 224, the President of the Commonwealth Conciliation and Arbitration Court, had made an award as to the hours of work, wages, conditions, work done in holidays and other matters concerning the terms of employment of builders' labourers throughout Australia. An application was made to the High Court to prohibit the enforcement of the awards on the ground that there was no industrial dispute extending beyond the limits of any one State. The High Court held that there was such a dispute and refused to prohibit, also declined to grant a certificate for leave to appeal to the Privy Council. Notwithstanding this refusal the employers went to the Privy Council. A preliminary objection was taken that the appeal was incompetent in the absence

of a certificate. The Privy Council refused to entertain the appeal. They held that a decision by the High Court that a particular dispute was a dispute extending beyond the limits of one State and that in respect of it the President of the Commonwealth Court of Conciliation and Arbitration had, under legislation of the Commonwealth passed pursuant to their constitutional powers, jurisdiction to make an award, is a decision upon a question as to the limits *inter se* of the constitutional powers of the Commonwealth and those of the States. Therefore, under section 74 of the Constitution the Privy Council had no jurisdiction to entertain an appeal from such a decision in the absence of a certificate by the High Court pursuant to that section.

Their Lordships considered that the High Court had decided first, that the dispute before them was one extending beyond the limits of one State ; and secondly that the President had jurisdiction to make his award under the legislation of the Commonwealth passed pursuant to its constitutional powers. The High Court decided that the frontier of the Commonwealth power reaches in this case into the State, and it therefore followed that the State has not exclusive, if any, power in this case. This appeared to their Lordships to be a question as to the limits *inter se* of the several powers, however much or little the Commonwealth may be required to conform to State laws or State awards, and however much or little the State may impose laws upon its subjects : *Jones and Others v. The Commonwealth Court of Conciliation and Arbitration and the Attorney-General for the Commonwealth*, (1917) App. Cas., at p. 528 ; 24 C.L.R., at p. 396.

Original jurisdiction of High Court.

75. In all matters—

- (i.) Arising under any treaty :
- (ii.) Affecting consuls or other representatives of other countries :
- (iii.) In which the Commonwealth,<sup>133</sup> or a person suing or being sued on behalf of the Commonwealth, is a party :
- (iv.) Between<sup>134</sup> States, or between residents<sup>135</sup> of different States, or between a State and a resident of another State :

(v.) In which a writ of Mandamus<sup>186</sup> or prohibition or an injunction is sought against an officer of the Commonwealth :  
the High Court shall have original jurisdiction.

§ 133. "IN ALL MATTERS . . . IN WHICH THE  
COMMONWEALTH . . . IS A PARTY."

#### LEGISLATION.

JUDICIARY ACT No. 4 OF 1915, Section 3.

CRIMES ACT 1914-1915.

#### Criminal Prosecutions.

The words of section 75 (III.) giving the High Court original jurisdiction in all matters in which the Commonwealth is a party are sufficient to give the High Court original jurisdiction in criminal prosecutions for violation of the laws of the Commonwealth in which the Attorney-General for the Commonwealth is the prosecutor. If, however, this view is incorrect the jurisdiction of the Court is unquestionably settled by the Judiciary Act (1903) as amended by the Judiciary Act, No. 4 of 1915, section 3, which amends section 30 of the Principal Act by adding words conferring jurisdiction on the High Court in trials of indictable offences against the laws of the Commonwealth ; and by the Crimes Act, No. 12 of 1914 and the Crimes Act, No. 6 of 1915, which confers similar jurisdiction.

The Constitution, section 75 (III.) provides that the High Court shall have original jurisdiction in all matters in which the Commonwealth is a party. On the question whether the High Court has jurisdiction in criminal cases prosecuted by the Commonwealth, the Chief Justice, Sir SAMUEL GRIFFITH, in the case of *The King v. Kidman*, (1915) 20 C.L.R., at p. 437, said :—" The other objections raised on the motion to quash the indictment related to the competence of this Court to exercise original jurisdiction in respect of the offence. The judicial power is a part of the right of sovereignty. It extends to the administration of justice in respect as well of violations of the law which entail penal consequences as to infractions of civil rights." *Per* GRIFFITH, C.J., 20 C.L.R., at p. 437.

Mr. Justice ISAACS referring to the same point, said :—" Section 75 (III.) says that the High Court of Australia shall have original

jurisdiction in all matters wherein the Commonwealth is a party, and therefore, in such a matter as I have predicated, all that remains is to see whether in a given case the Commonwealth is properly represented. Unless some competent law alters the common law the King in such a cause is properly represented by his Attorney-General—which, of course, means the Attorney-General of the Commonwealth. In a matter of an offence against the State, the proper officer to prosecute is the Attorney-General. Certain requirements as to preliminary inquiry and commitment for trial, have been prescribed by section 68 of the Judiciary Act 1903-1914, but only as regards offences “against the laws of the Commonwealth.” The more recent Act, No. 4 of 1915, however, by section 3 expressly provides that an indictment may be filed by the Attorney-General in the High Court without such examination or commitment where there is charged an indictable offence “against the laws of the Commonwealth.” *Per ISAACS, J.*, 20 C.L.R., at p. 446.

#### § 134. “MATTERS BETWEEN STATES.”

##### Boundary Questions.

The matters between States, in respect of which original jurisdiction is by section 75 of the Constitution conferred on the High Court, are matters which are of a like nature to those which can arise between individuals and which are capable of determination upon principles of law. Therefore, the boundary between two States having been fixed by an Imperial Act of Parliament before Federation, it was held that the High Court had jurisdiction to entertain an action by one of these States against the other seeking a declaration that certain land adjoining that boundary and in the *de facto* occupation of the latter State formed part of the territory of the former State: *The State of South Australia v. The State of Victoria*, (1911) 12 C.L.R., 667.

The Chief Justice (Sir SAMUEL GRIFFITH):—“I assent to the argument that the jurisdiction of the High Court, if any, is judicial and not political. So far, therefore, as a controversy requires for its settlement the application of political as distinguished from judicial considerations, I think that it is not justiciable under the Constitution. The law of the Empire, including Statute law, is binding as well upon dependencies, regarded as political entities, as upon individual subjects. If, therefore, any dependency fringes the law of the Empire governing its relations with a neighbouring

dependency it is guilty of a wrong towards that other dependency. Similar wrongs committed by one independent State against another are not justiciable, because there is no tribunal which has jurisdiction to take cognizance of them. But if there is a tribunal which has jurisdiction to summon a dependency before it, there is no reason why such a wrong should not be redressed. This Court has such jurisdiction. The question, therefore, whether the State of Victoria has infringed the Statute law of the Empire as regards South Australia may be inquired into by this Court as a "matter between States," within the meaning of section 75 of the Constitution. For these reasons I am of opinion that this Court has jurisdiction to entertain a suit of this nature."

### The Judicial Power in Controversies between States.

In an action brought in the High Court between States or between a State and a resident of another State the question may be raised as to the nature and extent of the judicial power which may be exercised by the High Court. By section 78 the Parliament may make laws conferring rights to proceed against the Commonwealth or a State in respect of matters "within the limits of the judicial power"; but in section 75 (iv.), giving the High Court original jurisdiction in matters between States, there is no reference to the limits of the judicial power.

A case which belongs to the jurisdiction of the Supreme Court on account of the interest a State has in the controversy must be one in which the State is either nominally or substantially the party. It is not sufficient if the State be but consequentially affected: *Fowler v. Lindsay* and *Fowler v. Miller*, 3 Dall., 411; *New York v. Connecticut*, 4 Dall., 3.

The Supreme Court of the United States has frequently declined to take jurisdiction in inter-state controversies, which, according to settled principles of public law, are not the subjects of judicial cognizance: *Hans v. Louisiana*, 134 U.S., at p. 1. The mere fact that the State is a plaintiff is not a conclusive test that the controversy is one in which the Supreme Court is authorized to grant redress against another State or its citizens: *Wisconsin v. Pelican Insurance Co.*, 127 U.S., 265.

The most numerous class of cases in which the Supreme Court of the United States has entertained suits between States has been

respecting disputed boundaries between States : *Iowa v. Illinois*, 151 U.S., 238. It has been held that the jurisdiction is not defeated because of the fact that in deciding the question the Court must examine and construe compacts between States, or because the jurisdiction affects the territorial limits of the political jurisdiction and sovereignty of the States : *Virginia v. West Virginia*, 11 Wall., 39 ; *Rhode Island v. Massachusetts*, 12 Pet., 657.

The State of Pennsylvania has sufficient interest to sustain an application to the Supreme Court of the United States in the exercise of its original jurisdiction to maintain a bill in chancery to compel by injunction the removal of obstructions from the Ohio River : *Pennsylvania v. Wheeling Bridge Co.*, 13 How., 518.

There are only a few reported cases in which the aid of the Supreme Court has been invoked in controversies between States. It has declined to take jurisdiction of suits between States to compel the performance of obligations which, if the States had been independent nations, could not have been enforced judicially, but only through the political departments of their Governments. Thus, in *Kentucky v. Dennison*, 24 How., 66, where the State of Kentucky, by her Governor, applied to the Court in the exercise of its original jurisdiction for a writ of mandamus to the Governor of Ohio, to compel him to surrender a fugitive from justice, the Court holding that the case was a controversy between two States, decided that it had no authority to grant the writ. In *New Hampshire v. Louisiana* and *New York v. Louisiana*, 108 U.S., 76, it was adjudged that a State to which, pursuant to her Statutes, some of her citizens, holding bonds of another State, had assigned them, in order to enable her to sue on and collect them for the benefit of the assignors, could not maintain a suit in the Supreme Court against the other State. In the case of *South Carolina v. Georgia*, 93 U.S., 4, the Supreme Court, *per* Mr. Justice STRONG, left the question open whether " a State when suing in that Court for the prevention of a nuisance in a navigable river of the United States, must not aver and show that it will sustain as a State some special and peculiar injury therefrom, such as would enable a private person to maintain a similar action in another Court " ; and he dismissed the bill because no unlawful obstruction of navigation was proved.

It has been contended by some constitutional jurists that the limits of the judicial power in suits between States under the American

as well as under the Australian Constitution, are wider than has generally been supposed, and embrace matters outside the executive and legislative powers of the general government, but in respect of which these powers can supply what may be wanting to give the judicial authority effect: *Commonwealth Law Review*, vol. II., at p. 248. In controversies between States, it is argued something more than the rights of particular individuals are involved. The magnitude of the issues may call for the intervention of the State and entitle it, apart from its interests in a non-representative capacity, to appear as a litigant in defence of the rights of its residents. As Chief Justice FULLER observed in the course of his judgment on the demurrer on *Kansas v. Colorado*, 206 U.S., 46, the mere fact that a State had no pecuniary interest in the controversy would not defeat the original jurisdiction of the Court which might be invoked by the State as *parens patriae*, trustee, guardian, or representative of all or a considerable portion of its citizens.

In support of these views reference may be made to a number of other American decisions. In the case of *Rhode Island v. Massachusetts*, 12 Pet., 657, Mr. Justice BALDWIN, said:—"The submission by Sovereign States, to a Court of law, of a controversy between them, without prescribing any rule of decision, gives power to decide according to the appropriate law of the case, which depends on the subject-matter, the source and nature of the claims of the parties, and the law which governs them. From the time of such submission, the question ceases to be one of political power; it comes to the Court to be decided by its judgment, legal discretion, and solemn considerations of the rule of law appropriate to its nature as a judicial question depending on the exercise of judicial power; as it is bound to act by known and settled principles of national or municipal jurisprudence as the case required." These principles were applied in *Pine v. City of New York* (112 Fed. Rep., 98), in which a number of cases, the judgments in which were based on the rule that territorial sovereignty does not extend to the authorization of acts injurious to the rights of other States or the residents thereof, were reviewed and followed: *Cooley's Const. Law*, at p. 133.

Mr. Justice SHIRAS, in giving judgment in the case of *Missouri v. Illinois*, (1901) 180 U.S., 208, said:—"The cases cited show that such jurisdiction has been exercised in cases involving boundaries and jurisdiction over lands and their inhabitants, and in cases



directly affecting the property rights and interests of a State. But such cases manifestly do not cover the entire field in which such controversies may arise, and for which the Constitution has provided a remedy; and it would be objectionable, and indeed, impossible, for the Court to anticipate by definition what controversies can, and what cannot, be brought within the original jurisdiction of this Court."

It has been suggested that there may be in force, throughout the Commonwealth, a substantive law other than that which attaches to the Executive powers of the Crown, or which is derived from the Commonwealth Constitution or legislation thereunder, but to which the Constitution has supplied a sanction. In America this law is not identical with the common law of the several States, or with that which "based equally upon the common law of England and of the several States" has come to be recognized, along certain lines, as "a common law of the United States, which is certain to assert and re-assert itself more and more as the Federal jurisdiction grows and developes, particularly in cases involving the law merchant, the law of commercial paper, and the like," and of which the decision in *In re Neagle* (135 U.S., at p. 69), that there is a peace of the United States, as distinguished from the peace of the individual States, a breach whereof is possible within the territorial limits of a State, affords an instance (*Encyclopaedia of the Laws of England*, vol. 1, p. 242): see *supra*, at p. 90.

This substantive law has been described in America as the common law between States and is said to be deduced from the principles of international law and usage. It does not appear, however, that there is any reason, necessity or justification for resort to such a law under the Constitution of the Australian Commonwealth, in the settlement of controversies between States, or between residents of different States: *Commonwealth Law Review*. (1904-1905) vol. II., at p. 250.

### § 135. "RESIDENTS OF DIFFERENT STATES."

On a motion for judgment in an action in the High Court for foreclosure of an equitable mortgage by deposit of title deeds of land in Western Australia, the mortgagee being a resident of South Australia and the mortgagor's place of residence being unknown, *held*, that the High Court had no jurisdiction, it not having been

established that the parties at the time of the bringing of the action were residents of different States. *Per* GRIFFITH, C.J., *Dahms v. Brandsch*, 13 C.L.R., 336.

§ 136. "MANDAMUS, PROHIBITION OR INJUNCTION."

**Original Corrective Jurisdiction.**

The leading American case of *Marbury v. Madison*, 1 Cranch., 137; and subsequent cases disclose a serious defect in the Constitution of the United States, for they show that though the Supreme Court of the United States may issue process in the nature of mandamus and prohibition to inferior Courts as ancillary to its appellate jurisdiction, it cannot issue such writs either to Courts or to individuals as an exercise of original jurisdiction, and it is powerless to check unlawful assumptions of jurisdiction unless where recourse can be had to it by way of appeal. The Constitution of the Commonwealth in section 75 (v.), confers the power wanting in the Constitution of the United States and gives original jurisdiction to the Australian High Court to control not only non-judicial officers but Federal Courts exceeding their jurisdiction, whether appeal lies from them or not. The words "officer of the Commonwealth" used in it, naturally and properly include both judicial and non-judicial officers, and so apply to Federal Courts, for it is to the Judge presiding in a Court that the writ of prohibition is directed, and the writ of prohibition itself for all practical purposes is not applicable to any Commonwealth officer other than a judicial officer. If this reading of section 75 (v.) be not adopted the Commonwealth Parliament by taking away the right of appeal under section 73, may be at liberty to create tribunals which will be competent to finally interpret the Constitution and define its limitations, a function which the Constitution clearly intended to entrust to this Court: *The Tramways Case* (No. 1), *per* GAVAN DUFFY and RICH, JJ., (1914) 18 C.L.R., at pp. 82-83.

This sub-section 75 (v.) of the Constitution gives the High Court original jurisdiction in all matters in which a writ of mandamus, prohibition or injunction is sought against an officer of the Commonwealth. The question has been raised as to whether under the Constitution, the High Court has an original corrective jurisdiction to grant those writs against inferior Commonwealth Courts as well as against Commonwealth officers.

The Judiciary Act 1903-1910, section 33, under the heading of "original jurisdiction" authorizes the High Court to make orders or direct the issues of writs commanding Federal Courts to perform any duty relating to the exercise of Federal jurisdiction or requiring any Court to abstain from the exercise of any Federal jurisdiction which it does not possess. There is also a separate paragraph in the section authorizing the High Court to direct the issue of writs of mandamus. This section, it is declared, shall not be taken to limit by implication the power of the High Court to make any order or to direct the issue of any writ. Section 38 of the same Act gives the High Court exclusive jurisdiction over the several Courts of the States in all matters in which a writ of mandamus or prohibition is sought against an officer of the Commonwealth or a Federal Court.

It has been held by the High Court that the jurisdiction in respect of mandamus conferred upon it by the Constitution, section 75 (v.) has not been enlarged by the Judiciary Act, section 33: *The King v. The Governor of South Australia*, (1907) 4 C.L.R., 1497. It has also been held by the High Court that the writ of prohibition referred in section 38 of the Judiciary Act is the prerogative writ for the control by superior Courts of inferior Courts exceeding their jurisdiction and that it does not include the statutory writ of prohibition which the Supreme Court of New South Wales is authorized to issue by the law of that State and which is in reality a form of appeal: *Wilcox v. Donohoe*, (1905) 3 C.L.R., 83.

Of course the Judiciary Act could not give the High Court more jurisdiction or judicial power than is authorized by the Constitution itself. In this condition of the law, constitutional and statutory, the question has been raised as to whether the High Court has original corrective jurisdiction to control by writs or other orders the proceedings of inferior tribunals which purport to exercise Federal jurisdiction that they do not possess. The control of the High Court by the exercise of original jurisdiction under section 75 of the Constitution must, of course, be distinguished from its control in the exercise of appellate jurisdiction under section 73. The important distinction between the two powers is that the appellate jurisdiction is subject to such exceptions and regulations as Parliament may prescribe but Parliament cannot cut down or limit the original jurisdiction of the Court defined by section 75.

**Mandamus.**

In *Ah Yick v. Lehmert*, (1905) 2 C.L.R., 593, the appellant had been convicted and fined by the Court of Petty Sessions, Melbourne, for an offence against the Immigration Restriction Act. He appealed to the Court of General Sessions. Judge JOHNSTON held that that Court had no jurisdiction, as it was a Federal matter, and that an appeal could only be had to the High Court. An order *nisi* was then obtained from the High Court calling upon the learned Judge and the informant to show cause why a writ of mandamus should not issue to compel the learned Judge to hear and determine the appeal.

The High Court held that the Court of General Sessions possessed an invested Federal appellate jurisdiction under the Judiciary Act, section 39; that under that section the several Courts of the States have Federal appellate jurisdiction, as regards the matters enumerated in sections 75 and 76 of the Constitution, to the same extent that, and subject to the same conditions as, under the State laws they have appellate jurisdiction in matters to which the State laws apply.

The High Court further held that where a Court of a State declines jurisdiction, in a matter as to which it is invested with Federal jurisdiction, the remedy is by recourse to the appellate jurisdiction of the High Court. A mandamus to hear was therefore granted. In delivering the judgment of the Court the Chief Justice (Sir SAMUEL GRIFFITH) said the application was in reality an invocation of the appellate jurisdiction of the High Court. He pointed out that the granting of writs of mandamus, prohibition, and *habeas corpus* at common law may be regarded as in one sense an exercise of original jurisdiction, and in another as the exercise of appellate jurisdiction. When there is a general appeal from an inferior Court to a Court of Appeal it can entertain any matter, however arising which shows that the decision of the Court below is erroneous. The error may consist in a wrong determination of a matter properly before the Court for its decision, or it may consist in an assertion by that Court of a jurisdiction which it does not possess, or it may consist in a refusal of that Court to exercise jurisdiction which it possesses. In all these cases the Court of Appeal can exercise its appellate jurisdiction in order to set the error right. It was so

held in the United States in *Marbury v. Madison*, 1 Cranch., 137. No question, therefore, arises as to the validity of section 33 of the Judiciary Act 1903.

"It appears therefore" (said the Chief Justice) "that no difficulty exists as to the jurisdiction of this Court to entertain an appeal in the present case, and that it is quite immaterial whether this motion is regarded as an application for a mandamus, or as an application for an order to the Court of General Sessions to hear the case, or as an appeal from a decision of that Court refusing to entertain the case. It follows incidentally from what I have said, that in this case an appeal lies as of right, and therefore that it was not strictly necessary to move for an order *nisi* for a mandamus, and that the proper title of the matter is '*Ah Yick v. Lehmert*.'" The High Court held that on the plain words of section 39, the Court of General Sessions had authority to exercise its appellate jurisdiction, and to hear the appeal from a Police Magistrate, with regard to an offence against the Immigration Restriction Act 1901.

On the point whether the issue of a mandamus was an exercise of original or appellate jurisdiction, Mr. Justice BARTON thought it was within the original power.

"I am not sure," said His Honor, "that it was actually necessary to make the special provision contained in section 33 of the Judiciary Act 1903, authorizing the issue of writs of mandamus. It was established in the case of *Marbury v. Madison* (1 Cranch., 137) that, if a mandamus is sought from a Court of appellate jurisdiction, it must be shown that its grant is an exercise of appellate jurisdiction. The position is clearly stated in *Quick and Garran's Constitution of the Australian Commonwealth*, at p. 779."

"That" continued His Honor "represents the law as laid down in *Marbury v. Madison*. Of course it is well known that there is a difference between our Constitution and that of the United States, because in the former, original jurisdiction is by section 75 (v.) given to the High Court in matters in which mandamus is sought against a non-judicial officer of the Commonwealth. That case was not provided for in the United States Constitution, and hence the decision in *Marbury v. Madison* that mandamus to a non-judicial officer was outside the powers of the Constitution, and that therefore the Act of Congress purporting to authorize the grant of such a mandamus was not valid. That additional jurisdiction, however,

being given by our Constitution, it seems to me that there is nothing in the contention that as section 75, sub-section (v.) gives original jurisdiction to the High Court in that particular class of mandamus, it has an exclusive effect as to other cases of mandamus. In my opinion it is clear that section 75 (v.) was inserted to prevent doubts from arising by reason of the decision to which I have referred, and that it has no other effect than to add a new and distinct power to the powers which the High Court inherently possesses—I mean those which are necessary to secure that any other Court created or invested with Federal jurisdiction by the Parliament does not either exceed, or deny the exercise of, its jurisdiction.” *Per* BARTON, J. in *Ah Yick v. Lehmert*, (1904) 2 C.L.R., at p. 608.

### Prohibition Cases.

The first important prohibition case dealt with by the High Court was that of *The King v. The Commonwealth Court of Conciliation and Arbitration*; *Ex parte Broken Hill Proprietary Co. Ltd.*, (1909) 8 C.L.R., 419. An application was made for a writ of prohibition to restrain the President of the Court from proceeding further with an award which he had made on the ground that it exceeded the jurisdiction of the Court in certain respects; that it travelled outside the real industrial dispute in issue into matters which were not in dispute which had not been submitted to the Court and which had no possible connection with the dispute. One of the chief difficulties which the applicants for the prohibition had to encounter was section 31 of the Conciliation and Arbitration Act 1904. That section declared that:—“No award of the Court shall be challenged, appealed against, reviewed, quashed or called in question in any Court on any account whatever.” Mr. Justice O’CONNOR, referring to this section said:—

“Now it is clear that the Commonwealth Arbitration Act intended to create a Court which within the limits of its jurisdiction should be absolutely independent of all control by any other Court. No prohibition or *certiorari* will go to it while it keeps itself within those limits. While acting within its jurisdiction, it is not bound by forms or technicalities. It may make its own rules, it may admit evidence in any way it deems fair, it may take any step it thinks fit for the purpose of informing itself as to the subject brought before it for inquiry; but the fundamental condition under which it

exercises all these powers is that it shall confine itself to the matters which are by the Act handed over to its jurisdiction. *Per O'CONNOR, J.*, 8 C.L.R., at p. 449.

Mr. Justice ISAACS, later on in the same case, in referring to same matters, said :—

“ In view of the express words of the Act there is no general appellate power over the decisions of the Commonwealth Court of Conciliation and Arbitration, and no power to interfere on any ground but want of jurisdiction. That Court, like every other tribunal acting within the ambit of its authority, may decide the matters entrusted to it rightly or wrongly, and either in fact or in law. And general appeal being excluded, the determination is final and conclusive, whether it seems right or wrong, just or unjust. If, however, in making this award the learned President has acted partly within or partly beyond his jurisdiction, if he has overstepped the boundary of his judicial domain, then, no matter how meritorious the decision may appear to be, it is the duty of this Court having regard to the nature of the case to grant a prohibition *quoad* the excess, according to long established principles.”

“ The distinction between an erroneous decision by a body having jurisdiction to deal with a particular subject matter, and a decision by a body having no jurisdiction over the matter decided, is familiar to all lawyers, and must be steadily borne in mind in this case.” *Per ISAACS, J.*, 8 C.L.R., 453. In the result the prohibition was granted by the Court notwithstanding section 31 of the Act.

The second important prohibition case was that of *The King v. Commonwealth Court of Conciliation and Arbitration; Ex parte Whybrow & Co.*, (1910) 11 C.L.R., 1. In that matter an application was made on behalf of certain boot manufacturers for a writ of prohibition to restrain the President of the Court from further proceeding upon an award on the grounds, *inter alia*, that there was no proof of an industrial dispute within the meaning of the Constitution. A preliminary objection was taken that prohibition did not lie to the Commonwealth Court of Conciliation and Arbitration. It was argued that the High Court has no original corrective jurisdiction over inferior tribunals, such as is exercised by the Supreme Court of a State, or the High Court in England. It could only grant prohibition in the exercise of its appellate jurisdiction, except

where prohibition is sought against an officer of the Commonwealth, in which case original jurisdiction is conferred upon the High Court by section 75 (v.) of the Constitution. But the President of the Commonwealth Court of Conciliation and Arbitration was not an officer of the Commonwealth, and section 75 (v.) had, therefore, no application to the present case. The appellate jurisdiction of the High Court was defined by section 73 of the Constitution. Section 33 of the Judiciary Act 1903 was simply a declaration of the manner in which such jurisdiction may be exercised, but it cannot extend the jurisdiction previously conferred. Prohibition, it was argued, might be granted by the Court in the exercise of its appellate power, but the Legislature had expressly provided, by section 31 of the Commonwealth Conciliation and Arbitration Act, that no appeal shall lie from an award of the Court constituted under that Act. If, therefore, the Court had no original jurisdiction to grant prohibition, and was precluded by the provisions of section 31 of the Act from exercising its appellate jurisdiction, the present application should fail. There was, it was said, a clear distinction between the grant of prohibition, and the exercise of appellate power. Section 75 (v.) applied only to cases in which mandamus or prohibition was sought against a non-judicial officer : *Ah Yick v. Lehmert*, 2 C.L.R., 593, at p. 609.

In support of the application it was submitted that the High Court had jurisdiction in this case under sections 75 (v.) and 76 of the Constitution and Part IV. of the Judiciary Act. Under both these Acts the Court was given original jurisdiction. Under section 71 of the Constitution the whole of the judicial power of the Commonwealth was vested in the High Court, that is the power of the King so far as this power is exercised by Courts of law. This involved as an essential element, jurisdiction to inquire into the validity of all judicial power purporting to be exercised under the Constitution. The exercise of this power of prohibition was included in the words "judicial power of the Commonwealth"; section 71 of the Constitution. That had inherent in it everything necessary for carrying out the judicial power, and was not limited by the description subsequently given. With respect to section 31 of the Arbitration Act it was contended that the words "award of the Court" in that section meant an award which the Court of Arbitration had power to make. It merely limited the appellate power of this Court so



as to prevent the merits of the case from being reconsidered, but did not take away the power to restrain further proceedings under an invalid award.

The High Court (*per* GRIFFITH, C.J. and BARTON, O'CONNOR and ISAACS, JJ.) overruled the preliminary objection and after hearing arguments on the merits decided to enlarge the rule *nisi* to enable the invalid parts of the award to be eliminated.

The Chief Justice (Sir SAMUEL GRIFFITH) analysed and dealt with the objections as follows:—The first objection, he said, was that the prohibition was within the language of section 31 of the Commonwealth Conciliation and Arbitration Act 1904, which enacted that “No award of the Court shall be challenged, appealed against, reviewed, quashed, or called in question in any other Court on any account whatsoever.” In *Clancey's Case*, 1 C.L.R., 181, the High Court had to deal with the same point raised upon identical words in the New South Wales Industrial Arbitration Act of 1901, and it held, in accordance with a uniform line of English decisions, that such an enactment does not extend to cases in which a Court of limited jurisdiction has exceeded its jurisdiction.” Then the point was put in another way, thus:—Under the Constitution (section 73) an appeal lies to the High Court from every other Federal Court unless otherwise enacted by Parliament. Therefore an appeal would lie from the Arbitration Court unless it had been denied by section 31. If it had not been denied, and an appeal were brought, this Court could on the appeal entertain the question of jurisdiction. Therefore, it was said, that the jurisdiction of this Court is denied as to every point that could be raised on appeal”: 11 C.L.R., at p. 21.

“But,” said the Chief Justice, “the answer to this argument was obvious. Where an appeal lies from one Court to another the Court of Appeal can set aside the judgment appealed from on any ground on which it appears that the judgment appealed from is erroneous. Want of jurisdiction to pronounce it is such a ground. But it does not follow that enforcement of the judgment may not be prohibited by a Court having jurisdiction to make such an order, although no appeal lies to the prohibiting Court. In the great majority of cases of prohibition the prohibiting Court is not a Court of Appeal from the Court prohibited. If any further proof were needed it is afforded by the consideration that a prohibition may be

asked for by a person not a party to the proceedings in which the judgment has been given. Whether, therefore, an appeal lies or does not lie is wholly immaterial."

"The other ground," said the Chief Justice, "on which the objection is supported is that this Court has no original jurisdiction to grant prohibition to an inferior Federal Court. Section 75 of the Constitution confers original jurisdiction upon the High Court in all matters in which a writ of mandamus or prohibition or an injunction is sought against an officer of the Commonwealth. A prohibition is a writ directed to the Judge and parties in an inferior Court, and does not lie except to persons or bodies exercising judicial or quasi-judicial functions. It lies to a pretended Court as well as to a real one. When, therefore, the Constitution speaks of a prohibition against an officer of the Commonwealth it means an officer whose functions are judicial or quasi-judicial. It cannot be denied that the Judge of the Arbitration Court is an officer of the Commonwealth, or that his functions are judicial. In my opinion, therefore, the Court has original jurisdiction under the Constitution itself to grant prohibition against him": 11 C.L.R., at p. 22.

"If the meaning of the words of section 75 were even ambiguous, the necessity of such a controlling power existing somewhere is so apparent that I should think that the ambiguity should be resolved in favour of the power. Even if this construction of the Constitution were not accepted, the Court clearly has jurisdiction under the express words of section 76, which authorizes Parliament to confer original jurisdiction on the High Court in any matter arising under the Constitution, or involving its interpretation, or arising under any law made by Parliament, and section 33 of the Judiciary Act, which authorizes the Court to make orders to direct the issue of writs "requiring any Court to abstain from the exercise of any Federal jurisdiction which it does not possess." "For all these reasons I am of opinion that the objection must be overruled." *Per* the Chief Justice (Sir SAMUEL GRIFFITH) in 11 C.L.R., at pp. 21 and 22.

Mr. Justice O'CONNOR held that by the Constitution, section 71, the supreme judicial power of the Commonwealth was vested in the High Court and it must necessarily include the power to keep inferior Courts of the Federal judicial system from exceeding their jurisdiction. That power was in its nature original, not appellate,

but it may be conferred in either form, and it had, in his opinion, been conferred as original jurisdiction in sub-section (v.) of section 75. It was expressly inserted in the Constitution by its framers, no doubt for more abundant caution, to prevent the question arising which was decided by the Supreme Court of the United States in *Marbury v. Madison*, 1 Cranch., 49. It had been objected that the words "officer of the Commonwealth" in sub-section (v.) were not intended to include the holder of a judicial office. The use of the word "prohibition" in itself implied that the officer referred to may be an officer exercising judicial or quasi-judicial functions. Giving the words their ordinary meaning, they would include all officers of the Commonwealth, judicial as well as non-judicial, and neither in the group of sections dealing with the judiciary, nor in any part of the Constitution, was there an indication that its framers used the words with a meaning narrower than their ordinary meaning. So far from that being the case, there was every indication that the words were used in their widest sense, sections 71 to 75, inclusive, were clearly intended to equip the High Court completely with all the fundamental powers necessary for the discharge of its duty under the Constitution, a duty in the effective discharge of which the States and the Commonwealth are equally concerned": 11 C.L.R., at p. 42.

Mr. Justice ISAACS was of opinion that the objection failed, but for one reason only, namely, that the power of control by means of a writ of a prohibition is a part of the appellate power, and has not been taken away by Parliament: 11 C.L.R., at p. 47.

### **Can Prohibition be taken away?**

In November 1911, the amending Conciliation and Arbitration Act was passed containing section 14 which purported to amend section 31 of the Principal Act to read as follows:—"No award or order of the Court shall be challenged appealed against reviewed quashed or called in question or be subject to prohibition or mandamus."

By this Act the Federal Parliament unmistakably expressed its will that writs of prohibition against the President of the Conciliation and Arbitration Court should be abolished. The question was, however, raised as to the constitutionality of section 14 of the amending Act. In *The King v. The Commonwealth Court of Conciliation and Arbitration and Merchant Service Guild*, (1912) 15

C.L.R., 586. That was an application for a writ of prohibition directed to the President to prevent the enforcement of an award on the ground that there was no industrial dispute within section 51 (xxxv.) of the Constitution. The majority of the Court (GRIFFITH, C.J. and BARTON, J.) held (ISAACS, J. dissenting), that no "industrial dispute" within the meaning of section 51 (xxxv.) of the Constitution existed, and, therefore, that the Commonwealth Court of Conciliation and Arbitration had no jurisdiction to make an award; order absolute for prohibition.

In *The Tramway Case* (No. 1), 18 C.L.R., 54, an application was made to the High Court by the Brisbane and Adelaide Tramways authorities calling on the Court of Conciliation and Arbitration and the Australian Tramways Employees' Association to show cause why prohibition should not issue to restrain the enforcement of an award for want of jurisdiction. The High Court was asked to overrule the decision in *Whybrow's Case* with reference to prohibition, on the ground that the jurisdiction to grant prohibition was an exercise of the appellate jurisdiction of the High Court and that prohibition had been taken away. The High Court, *per* GRIFFITH, C.J. and BARTON, ISAACS, GAVAN DUFFY, POWERS and RICH, JJ. held that jurisdiction to issue prohibition to a tribunal acting without or in excess of jurisdiction was in its nature original and not appellate; that original jurisdiction had been conferred on the High Court by section 75 (v.) of the Constitution to issue prohibition to any officer of the Commonwealth; that the term "officer" includes any judicial officer; that the President of the Commonwealth Conciliation and Arbitration Court was such an officer and that therefore section 31 (1.) of the Act of 1911, so far as it purports to take away from the High Court the power to issue prohibition in respect of an award or order of the said Court was invalid. "I find it impossible," said GRIFFITH, C.J., "to suppose that the framers of the Constitution or the Parliament of the United Kingdom who must have been familiar with these matters intended by the use of the word "exception" in section 73 of the Constitution to include the power to take away prohibition for want of jurisdiction": *The King v. The Commonwealth Court of Conciliation and Arbitration, &c.* (*The Tramways Case*, No. 1), 18 C.L.R., 54.

Additional original jurisdiction. 137

76. The Parliament may make laws conferring original jurisdiction on the High Court in any matter—

- (i.) Arising under this Constitution, or involving its interpretation :
- (ii.) Arising under any laws<sup>138</sup> made by the Parliament :
- (iii.) Of Admiralty<sup>139</sup> and maritime jurisdiction :
- (iv.) Relating to the same subject-matter claimed under the laws of different States.

### § 137. " ADDITIONAL ORIGINAL JURISDICTION."

#### LEGISLATION.

##### JUDICIARY ACT 1903-1907-1915.

##### HIGH COURT PROCEDURE ACT 1915.

In addition to the matters in which original jurisdiction is conferred on the High Court by the Constitution, section 75, the High Court has had original jurisdiction conferred upon it in numerous other matters by the Judiciary Act.

By the combined operation of the Constitution, sections 75 and 76 and the Judiciary Act 1903, as amended by the Acts of 1907 and 1915 the original and primary jurisdiction of the High Court is as follows :—

- (1) In all matters arising under any treaty : Const., sec. 75 (I.).
- (2) In all matters affecting Consuls or other representatives of other countries : Const., sec. 75 (II.).
- (3) In all matters in which the Commonwealth or a person suing or being sued on behalf of the Commonwealth is a party : Const., sec. 75 (III.).
- (4) In all matters between States or between residents of different States or between a State and a resident of another State : Const., sec. 75 (IV.).
- (5) In all matters in which a writ of mandamus or prohibition or an injunction is sought against an officer of the Commonwealth : Const., sec. 75 (V.).
- (6) In all matters arising under the Constitution or involving its interpretation : Const., sec. 76 (I.) and Judiciary Act 1903-1907, sec. 30 and Judiciary Act 1915, sec. 2.

- (7) In matters (other than trials of indictable offences) involving any question, however arising, as to the limits *inter se* of the constitutional powers of the Commonwealth and those of any State or States or as to the limits *inter se* of the constitutional powers of any two or more States : Const., sec. 76 (I. and II.) and Judiciary Act 1903-1907, sec. 38A.
- (8) In suits by any State against the Commonwealth : Const., sec. 78 and Judiciary Act 1903-1907, sec. 57.
- (9) In suits by any State against another State : Const., sec. 78 and Judiciary Act 1903-1907, sec. 59.
- (10) To make orders or direct the issue of writs commanding the performance of any duty by any person holding office under the Commonwealth or removing from office any person wrongfully claiming to hold any office under the Commonwealth : Const., sec. 76 (II.) and Judiciary Act 1903-1907, section 33 (c) and (d).
- (11) In any matters arising under any laws made by the Parliament : Const., sec. 76 (II.).
- (12) In all matters of Admiralty and maritime jurisdiction : Judiciary Act 1915 : sec. 2.
- (13) In trials of indictable offences against laws of the Commonwealth : Judiciary Act 1915 : sec. 2.

**§ 138. " ARISING UNDER ANY LAW MADE BY THE  
PARLIAMENT."**

**LEGISLATION.**

JUDICIARY ACT, No. 4 of 1915, Section 3.

**Indictable Offences.**

This Act, which is to remain in operation during the present war and for six months thereafter, made the following amendment in the Principal Act. The Judiciary Act, section 30, is amended by omitting therefrom all words from and including the words " original jurisdiction in all matters," and inserting in their stead the words " original jurisdiction—(a) in all matters arising under the Constitution or involving its interpretation ; (b) in all matters of Admiralty or maritime jurisdiction ; and (c) in trials of indictable offences against the laws of the Commonwealth."

After section 71 of the Principal Act, the following new section is inserted, viz. :—" 71A. (1) Notwithstanding anything contained in this Part, or any provision of any State law, the Attorney-General of the Commonwealth may file an indictment for an indictable offence against the laws of the Commonwealth in the High Court or the Supreme Court of a State, without examination or commitment for trial. (2) Upon an indictment being so filed the Court or a Justice or Judge thereof, may cause a summons to be issued to the defendant to appear at the time and place mentioned in the summons there to answer the charge mentioned in the indictment, or may issue a warrant for his arrest, and may hold him in custody or admit him to bail."

#### HIGH COURT PROCEDURE ACT 1915.

This Act which is to continue in operation during the present war and for six months thereafter makes the following provision relating to criminal trials, namely :—" The trial by the High Court of indictable offences against the laws of the Commonwealth shall be by a Justice with a jury. The laws of such State relating to the qualification of jurors, the preparation of jury lists and jury panels, the summoning, attendance, and impannelling of juries, the number of jurors, the right of challenge, the discharge of juries, the disagreement of jurors, and the remuneration of jurors, for the purposes of the trial of criminal matters pending in the Supreme Court of that State, or relating to any other matters concerning jurors after they have been summoned or sworn, shall extend and be applied to the trial of indictable offences in the High Court in that State. so that the lists of jurors shall be deemed to be made as well for the purposes of the High Court as of the Supreme Court of the State."

#### CRIMES ACT, No. 12 OF 1914.

#### CRIMES ACT, No. 6 OF 1915.

In the case of *The King v. Kidman*, 20 C.L.R., 426, Arthur Kidman was presented on trial before the Chief Justice in the High Court, Sydney, in its original jurisdiction, charged with the offence of conspiracy to defraud the Commonwealth, contrary to the Crimes Act 1915. The question of jurisdiction was raised and the following questions were reserved for the consideration of the Full Court :—

- (1) Whether the Act No. 6 of 1915, so far as its provisions are retrospective, is within the competence of the Commonwealth Parliament ;

- (2) Whether it is within the competence of the Commonwealth Parliament to confer upon the High Court original jurisdiction in respect of offences against the common law ;
- (3) Whether the Act No. 6 of 1915 confers upon the High Court jurisdiction to deal with such offences ;
- (4) Whether the indictment is a matter to which the Commonwealth is a party within the meaning of section 75 (III.) of the Constitution ;

In delivering the judgment of the Full Court, the Chief Justice Sir SAMUEL GRIFFITH, said :—" If I am wrong in thinking that the High Court has original jurisdiction in criminal cases under section 75 (III.) of the Constitution, the Act of 1915 would undoubtedly confer such jurisdiction in trials of indictments for offences created by laws passed by the Parliament. In section 3 of the Judiciary Act 1915, which stands as section 71A of the Principal Act, and which provides that the Attorney-General may file an indictment in the High Court for any indictable offence against ' the laws of the Commonwealth ' without examination or commitment for trial, the same terms must have the same meaning, as also in section 2 of the High Court Procedure Act 1915 (No. 5) (standing as section 51A of the High Court Procedure Act 1903-1915), which enacts that the trial by the High Court of indictable offences against the laws of the Commonwealth shall be by a Justice with a jury. Whether, therefore, I am right or not in thinking that the Crimes Act, No. 12 of 1914, can be supported as a declaratory Act, I think that the Act No. 5 of 1915, is applicable to the trial of the present case. For these reasons I am of opinion that the High Court has original jurisdiction in respect of the indictment now in question, and that the motions to quash the indictment should be refused."

Mr. Justice ISAACS said :—" I am of opinion that the retrospective provisions of the Act, No. 6 of 1915, are within the competence of the Parliament of the Commonwealth."

After exhaustively discussing the various questions of law raised in the special case, His Honor concluded :—" In the result the chain is complete : (1) jurisdiction in the Court to entertain a charge of crime at common law against the Commonwealth ; (2) power in the Attorney-General to represent the Commonwealth ; (3) power to indict without the preliminary examination ; (4) the requisite character of the charge. To this should be added (5) that



the charge is not limited in form to the Statute, and therefore will apply to both the Statute and the common law": *per* ISAACS, J., 20 C.L.R., at pp. 439-448.

Mr. Justice POWERS, said:—"It was admitted that if the first question is answered in the affirmative it is not necessary to consider questions 2, 3 and 4. It is not therefore necessary to decide whether this Court has original jurisdiction to try criminal offences under sec. 75 (III) of the Constitution or under the common law of the Commonwealth or of the State, or whether the Commonwealth is a party to a trial on indictment within the meaning of the word 'party' in section 75 (III) of the Constitution. As to question 5. the Act, No. 4 of 1915 (Judiciary Act 1915), confers on the High Court original jurisdiction to try indictable offences against the laws of the Commonwealth; and an indictable offence against a law of the Commonwealth is charged in the indictment in question."

The motion to quash the indictment was refused, the Full Court holding that the first question should be answered in the affirmative: 20 C.L.R., 463.

#### **Other Acts.**

By the Customs Act 1901, section 245, customs prosecutions for the recovery of penalties or for the condemnation of ships or goods seized as forfeited may be instituted by action, information, or other appropriate proceedings in the High Court. Under the Excise Act 1901, section 134, excise prosecutions may be instituted in the High Court. Claims against the Commonwealth for compensation under the Property for Public Purposes Acquisition Act 1901, section 15, *et seq.*, may be instituted in the High Court. Under the Commonwealth Electoral Act 1902, the High Court is constituted a Court of Disputed Returns to deal with petitions against the validity of any Federal election or return. By the Patent Act 1903, the High Court can deal with certain matters arising under that Act.

### **§ 139. "IN MATTERS OF ADMIRALTY AND MARITIME JURISDICTION."**

#### **LEGISLATION.**

##### **JUDICIARY ACT, No. 11 OF 1914.**

The High Court is empowered to deal with matters of Admiralty and maritime jurisdiction. It is also declared to be a Colonial Court of Admiralty within the meaning of the Imperial Act known as the Colonial Court of Admiralty Act 1890.

**Accidents to Seamen.**

In the case of *The Kalibia Owners, &c. v. Wilson*, (1910) 11 C.L.R., 703, an attempt was made to sustain the validity of the Commonwealth Seamen's Compensation Act (1909) as an exercise of power with section 76 (III.) of the Constitution. Although this power is in terms confined to the making of laws to give original jurisdiction to the High Court, it was argued that it necessarily implied a power on the part of the Commonwealth to legislate substantively as to the Admiralty and maritime law generally. Cases were cited to show the adoption of that construction in the United States. Whatever might be the force of the reasoning of those cases, if Australia were in the same position as the United States at the time of the making of their Constitution—namely, that of a separated nation of independent sovereignty in its relation to the United Kingdom—the reason has no force here, where the implication from imperative necessity cannot be drawn. The power to legislate on matters of Admiralty and maritime laws, if it existed in several States at the time of Federation, remains reserved to them by force of section 107 of the Constitution. But there would be, and there is, an over-riding power to legislate on the subject in the Parliament of the United Kingdom, and the grant in section 76 (III.) cannot be construed as an implied transfer or even delegation, of that legislative power to the Parliament of the Commonwealth in respect of Australia. *Per* BARTON, J., 11 C.L.R., at p.p 703-704.

**Power to define jurisdiction.**

77. With respect to any of the matters mentioned in the last two sections the Parliament may make laws—

- (i.) Defining the jurisdiction of any federal court other than the High Court :
- (ii.) Defining the extent to which the jurisdiction of any federal court shall be exclusive<sup>140</sup> of that which belongs<sup>141</sup> to or is invested in the courts of the States :
- (iii.) Investing any court of a State with federal<sup>142</sup> jurisdiction.

## § 140. "EXCLUSIVE JURISDICTION OF HIGH COURT."

### LEGISLATION.

JUDICIARY ACT 1903-1910, Sections 38 and 38A.

The jurisdiction of the High Court is declared to be exclusive of the jurisdiction of the several Courts of the States in the following matters :—

- (a) Matters arising directly under treaty ;
- (b) Suits between States or between persons suing or being sued on behalf of different States, or between a State and a person suing or being sued on behalf of another State ;
- (c) Suits by the Commonwealth, or any person suing on behalf of the Commonwealth, against a State, or any person being sued on behalf of a State ;
- (d) Suits by a State, or any person suing on behalf of a State, against the Commonwealth or any person being sued on behalf of the Commonwealth ;
- (e) Matters in which a writ of mandamus or prohibition is sought against an officer of the Commonwealth or a Federal Court.

" 38A. In matters (other than trials of indictable offences) involving any question, however arising, as to the limits *inter se* of the constitutional powers of the Commonwealth and those of any State or States, or as to the limits *inter se* of the constitutional powers of any two or more States, the jurisdiction of the High Court shall be exclusive of the jurisdiction of the Supreme Courts of the States ; so that the Supreme Court of a State shall not have jurisdiction to entertain or determine any such matter, either as a Court of first instance or as a Court of Appeal from an inferior Court."

## § 141. "BELONGS TO THE COURTS OF THE STATES."

### LEGISLATION.

JUDICIARY ACT 1903, Section 39 (2) (a).

" **Belongs.** "

By the Constitution, section 77 (II.), the Parliament may make laws defining the extent to which the jurisdiction of a Federal Court shall be exclusive of that which " belongs to " or is vested in the

Courts of the States. Section 77 (II.) seems to imply that State Courts may possess some concurrent Federal jurisdiction, from which it may be desirable to exclude them ; a distinction is drawn between jurisdiction which " belongs " to the Courts of the States and jurisdiction with which the Courts of the States may be " invested " ; sub-section (III.) implies that the State Courts may lack some concurrent Federal jurisdiction with which it may be desirable to invest them. This is the key to sections 38 and 39 of the Judiciary Act. Section 38 defines certain matters which are excluded from the jurisdiction of State Courts ; section 39 deals with other matters of Federal jurisdiction not mentioned in section 38 in which it is desirable the State Courts should have Federal jurisdiction, but equally desirable that they should only have it as a gift from the Commonwealth, and on terms or regulations laid down by the Parliament. This was done by first excluding State Courts from jurisdiction in these matters except " as provided in the section " and then re-investing them with jurisdiction on certain conditions, and subject to certain restrictions. The several Courts of the States are within the limits of their several jurisdictions, whether such limits are as to locality, subject-matter, or otherwise, invested with Federal jurisdiction, in all matters in which the High Court has original jurisdiction or in which original jurisdiction can be conferred upon it, except as provided in section 38 : Judiciary Act 1903, section 39 (2).

The term " federal jurisdiction " means jurisdiction to deal with matters within the judicial power of the Commonwealth, i.e. the matters enumerated in sections 75 and 76 of the Constitution. Until the actual establishment of the Federal Courts the determination of such matters was, under covering clause V. of the Constitution, within the jurisdiction of the State Courts, who were bound to administer the laws of the Constitution and all laws passed by the Commonwealth Parliament.

Hence the words in sub-section (II.) " belongs to the Courts of the States " probably means that jurisdiction which was conferred on those Courts by the covering clause V. of the Constitution which states that " the laws of the Commonwealth shall be binding on the Courts and Judges " ; and that clause was in operation before the passing of the Judiciary Act which invested the State Courts with Federal jurisdiction.

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- (d) Suits by a State, or any person suing on behalf of a State, against the Commonwealth or any person being sued on behalf of the Commonwealth ;
- (e) Matters in which a writ of mandamus or prohibition is sought against an officer of the Commonwealth or a Federal Court.

" 38A. In matters (other than trials of indictable offences) involving any question, however arising, as to the limits *inter se* of the constitutional powers of the Commonwealth and those of any State or States, or as to the limits *inter se* of the constitutional powers of any two or more States, the jurisdiction of the High Court shall be exclusive of the jurisdiction of the Supreme Courts of the States ; so that the Supreme Court of a State shall not have jurisdiction to entertain or determine any such matter, either as a Court of first instance or as a Court of Appeal from an inferior Court."

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The term " federal jurisdiction " means jurisdiction to deal with matters within the judicial power of the Commonwealth, i.e. the matters enumerated in sections 75 and 76 of the Constitution. Until the actual establishment of the Federal Courts the determination of such matters was, under covering clause V. of the Constitution, within the jurisdiction of the State Courts, who were bound to administer the laws of the Constitution and all laws passed by the Commonwealth Parliament.

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" 38A. In matters (other than trials of indictable offences) involving any question, however arising, as to the limits *inter se* of the constitutional powers of the Commonwealth and those of any State or States, or as to the limits *inter se* of the constitutional powers of any two or more States, the jurisdiction of the High Court shall be exclusive of the jurisdiction of the Supreme Courts of the States ; so that the Supreme Court of a State shall not have jurisdiction to entertain or determine any such matter, either as a Court of first instance or as a Court of Appeal from an inferior Court."

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The term " federal jurisdiction " means jurisdiction to deal with matters within the judicial power of the Commonwealth, i.e. the matters enumerated in sections 75 and 76 of the Constitution. Until the actual establishment of the Federal Courts the determination of such matters was, under covering clause V. of the Constitution, within the jurisdiction of the State Courts, who were bound to administer the laws of the Constitution and all laws passed by the Commonwealth Parliament.

Hence the words in sub-section (II.) " belongs to the Courts of the States " probably means that jurisdiction which was conferred on those Courts by the covering clause V. of the Constitution which states that " the laws of the Commonwealth shall be binding on the Courts and Judges " ; and that clause was in operation before the passing of the Judiciary Act which invested the State Courts with Federal jurisdiction.



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The term " federal jurisdiction " means jurisdiction to deal with matters within the judicial power of the Commonwealth, i.e. the matters enumerated in sections 75 and 76 of the Constitution. Until the actual establishment of the Federal Courts the determination of such matters was, under covering clause V. of the Constitution, within the jurisdiction of the State Courts, who were bound to administer the laws of the Constitution and all laws passed by the Commonwealth Parliament.

Hence the words in sub-section (II.) " belongs to the Courts of the States " probably means that jurisdiction which was conferred on those Courts by the covering clause V. of the Constitution which states that " the laws of the Commonwealth shall be binding on the Courts and Judges " ; and that clause was in operation before the passing of the Judiciary Act which invested the State Courts with Federal jurisdiction.

It is open to argument, but not necessary to decide, whether before the establishment of Federal Courts the State Courts were, in determining such questions, exercising "federal jurisdiction" or not, for in the Judiciary Act the Parliament undertook to exercise the powers conferred by section 77 (II.). This they did by section 39 of the Judiciary Act, which enacts in the first place that the jurisdiction of the High Court, i.e., its power to exercise the judicial power of the Commonwealth, shall be exclusive of the jurisdiction of the several Courts of the States "except as provided in this section." Without the latter proviso, the jurisdiction of the State Courts would have been entirely ousted. "But" as pointed out by the judgment of the Court in *Baxter's Case*, *infra*, p. 735, "the Parliament might on the next day have passed another law investing the State Courts with Federal jurisdiction. And the fact that they proceeded to do so by the same Act can make no difference in the result than the fact that a power of revocation and new appointment is exercised by one instrument instead of two. The result is that the Federal jurisdiction of the State Courts is now derived from a new source, with all the incidents of jurisdiction derived from that new source, one of which is an appeal in all cases to the High Court": 4 C.L.R., at p. 1137.

#### § 142. "INVESTING WITH FEDERAL JURISDICTION."

##### LEGISLATION.

##### JUDICIARY ACT 1903-1910, Section 39 (1) (2).

39. "(1) The jurisdiction of the High Court, so far as it is not exclusive of the jurisdiction of any Court of a State by virtue of either of the last two preceding sections (38 and 38a) shall be exclusive of the jurisdiction of the several Courts of the States except as provided in this section."

39. "(2) The several Courts of the States shall within the limits of their several jurisdictions whether such limits are as to locality, subject-matter or otherwise, be invested with federal jurisdiction in all matters in which the High Court has original jurisdiction or in which original jurisdiction can be conferred upon it, except as provided in the last preceding section and subject to the following conditions and restrictions."

**Summary of Invested Jurisdiction.**

The invested Federal jurisdiction of the several Courts of the States as thus defined, may be summarized as follows :—

- (1) In all matters affecting Consuls, or any other representatives of other countries : Const., sec. 75 (II.) and Judiciary Act 1903-1910, sec. 39 (2).
- (2) In all matters between residents of different States : Const., sec. 75 (IV.) and Judiciary Act 1903-1907, sec. 39 (2).
- (3) In any matters arising under the Constitution, or involving its interpretation : Const., sec. 76 (I.) and Judiciary Act 1903-1910, sec. 39 (2) ; Judiciary Act 1915, sec. 2.
- (4) In any matter arising under any laws made by the Parliament : Const., sec. 76 (II.) and Judiciary Act 1903-1910.
- (5) In any matters of Admiralty or maritime jurisdiction : Const., sec. 76 (III.) and Judiciary Act 1903-1910 ; Judiciary Act 1915, sec. 2.
- (6) In any matters relating to the same subject-matter claimed under the laws of different States : Const., sec. 76 and Judiciary Act 1903-1910.
- (7) In any matters pending in the High Court, not being a matter in which the High Court has exclusive jurisdiction the Supreme Court of a State is invested with Federal jurisdiction to hear and determine practice and procedure applications : Const., sec. 77 (III.) and Judiciary Act 1903-1910, sec. 17.
- (9) In the prosecution, examination, commitment for trial and conviction of persons charged with offences against the laws of the Commonwealth the several Courts of a State can exercise Federal jurisdiction in the same manner as in similar proceedings against persons charged with offences against the laws of the State : Const. and Judiciary Act 1903-1910, sec. 68.
- (10) Suits by a private person against the Commonwealth may be brought either in the High Court or in the Supreme Court of the State in which the claim arises : Const., sec. 78 and Judiciary Act 1903-1910, sec. 56.

- (11) Suits by a private person against a State may be brought either in the High Court or in the Supreme Court of the State in which the claim arises : Const., sec. 78 and Judiciary Act 1903-1910, sec. 58. •
- (12) The several Courts of a State exercising jurisdiction with respect to—the summary conviction ; or the examination and commitment for trial on indictment ; or the trial and conviction on indictment, of offenders or persons charged with offences against the laws of the State shall have the like jurisdiction with respect to persons who are charged with offences against the laws of the Commonwealth committed elsewhere. The laws of each State respecting the arrest and custody of offenders and the procedure on trial are made applicable to persons charged with offences against the laws of the Commonwealth committed within that State : Judiciary Act 1903, sec. 68.

#### **Conditions of Invested Jurisdiction.**

The Judiciary Act 1903-1910, section 39, provides that the several Courts of the States shall be invested with Federal jurisdiction subject to the following expressed conditions and restrictions :

- (a) Every decision of the Supreme Court of a State, or any other Court of a State from which at the establishment of the Commonwealth an appeal lay to the Queen in Council, shall be final and conclusive except so far as an appeal may be brought to the High Court.
- (b) Wherever an appeal lies from a decision of any Court or Judge of a State to the Supreme Court of the State, an appeal from the decision may be brought to the High Court.
- (c) The High Court may grant special leave to appeal to the High Court from any decision of any Court or Judge of a State notwithstanding that the law of the State may prohibit any appeal from such Court or Judge.
- (d) The Federal jurisdiction of a Court of summary jurisdiction of a State shall not be judicially exercised except by a Stipendiary or Police or Special Magistrate or some Magistrate of the State who is specially authorized by the Governor-General to exercise such jurisdiction.

**Conditions and Restrictions.**

Attention may be here drawn to the various conditions and restrictions subject to which the State Courts have been invested with Federal jurisdiction ; taking them in the order in which they appear in section 39 of the Judiciary Act.

**(a) Relating to Appeal.**

The form of sub-section 2 (a) of section 39, beginning with the words " except so far as " etc. has led to the impression that they were intended as words of positive enactment or positive grant of appellate power. Such an enactment, however, would have been invalid ; the Parliament of the Commonwealth cannot give a right of appeal from Courts invested with Federal jurisdiction ; that can only be granted by the Constitution itself and the right of appeal in Federal jurisdiction is expressly provided for in section 75 of the Constitution. Section 39 of the Judiciary Act might have terminated with the words " final and conclusive." What then would have been the position ? The right of appeal to the Privy Council under the Orders in Council of 9th June, 1860, it was assumed would have gone but the right of appeal to the High Court under section 75 would have remained. At the same time the words " final and conclusive " would not have been sufficient to interfere with the prerogative right of the King-in-Council to grant special leave to appeal.

The intention of section 39 of the Judiciary Act, so far as regards the Supreme Courts of the States, is quite clear. It was that in a certain class of cases mentioned there should be no right of appeal from decisions of those Courts to any Court except the High Court. And as the right of appeal to the High Court was limited by Part V. of the Judiciary Act, appellate jurisdiction, it was desirable, though perhaps not necessary, to make it clear that the provisions was not intended to enlarge the right of appeal. The words " except so far as an appeal from the decision may be brought to the High Court " are apt words to express this intention to limit and merely mean " except so far, if at all, as the decision is, subject to exceptions, appealable to the High Court."

**(b) Relating to State Procedure.**

The Judiciary Act, section 39 (2) (b) may be regarded as formulating merely exceptions and regulations limiting the right of



appeal to the High Court in Federal jurisdiction cases. The Constitution, section 73 (II.) gives the right of appeal subject to such exceptions and regulations as Parliament may prescribe. Sub-section (b), section 39, of the Judiciary Act merely reduces or cuts down the right of appeal, it does not create or enlarge such right; thus sub-section (b) provides that where an appeal lies from a decision of any Court or Judge of a State to the Supreme Court of the State an appeal from a decision in Federal jurisdiction may be brought to the High Court direct. This is a regulation or limitation, not a grant.

**(c) Special Leave to Appeal.**

Sub-section (c) provides that the High Court may grant special leave to appeal to the High Court from any decision of any Court or Judge of a State in Federal jurisdiction, notwithstanding that the law of the State may prohibit any appeal from any such Court or Judge. This also is a limitation or regulation not a grant.

**Webb v. Outtrim in the Supreme Court.**

Reference has already been made to this constitutional case in its bearings on the question of immunity of the salaries of Commonwealth officers to State taxation, *supra*, at p. 168. It is proposed to refer to this case here in connection with the question of appeal to the Privy Council.

On the 1st February, 1905, an application was made by Mr. Webb, the State Commissioner of Taxation to Mr. Justice HODGES for leave to appeal to the Privy Council against the decision of the Full Court declaring that Mr. Outtrim, the Deputy Postmaster-General of Victoria was immune from State income taxation. Counsel on behalf of Mr. Outtrim expressed on behalf of his client his desire that the matter should be decided by the Privy Council and presented no argument against the application. In delivering his reserved decision on the 29th March, Mr. Justice HODGES held that so far as the Judiciary Act, section 39 (2) (a) purports to take away the right of appeal to the Privy Council, it was *ultra vires* the powers conferred on the Commonwealth Parliament by the Constitution. It was held, further, that, in so far as an appeal lies from a State Court to the Privy Council under the powers conferred by the Order in Council of 9th June, 1860, an Act of the Commonwealth Parliament cannot alter, qualify, or in part repeal the rights given by such Order in Council. "It will be noticed" said His Honor

“ that section 77 (II.) of the Constitution enacts that Parliament may make laws ‘ defining the extent to which the jurisdiction of any Federal Court shall be exclusive of that which belongs to or is invested in the Courts of the States ’; the distinction is between that which ‘ belongs to,’ and that which is ‘ invested in.’ The jurisdiction in the case under consideration ‘ belongs to ’ the Courts of the State. And in my opinion, the Commonwealth Parliament cannot take away the jurisdiction which ‘ belongs to ’ the Courts of the State, and then hand it back and say :—‘ now we hand this back to you as invested jurisdiction.’ In so far as the Legislature hands back jurisdiction, they repeal the provision which takes the jurisdiction away, and it is back, belonging, as it originally belonged, to the State Courts.” His Honor added :—“ They cannot say ‘ we take away this jurisdiction, which belongs to you, and hand it back to you, and the jurisdiction which belonged to you has now changed its character—it is invested jurisdiction. We hand it back, with the right of appeal to the King-in-Council gone. All we have done, all we want to do, is to take away the right of appeal to the King-in-Council.’ This the Commonwealth Parliament cannot do directly, and in my opinion, it cannot by devious paths do what it cannot do by a straight course.”

Referring to the definition of federal jurisdiction, His Honor said :—“ In my opinion, ‘ federal jurisdiction ’ refers to jurisdiction in such matters as did not, and could not, and would not, come within the cognizance of the Courts of the State unless and until some Act of the Federal Legislature gave such jurisdiction, and does not refer to matters within the cognizance of the State Courts outside of and independently of any legislative enactment ” : (1905) V.L.R., 463 ; 26 A.L.J., 198.

### **Webb v. Outtrim in the Privy Council.**

In May 1906, the appeal of *Webb v. Outtrim* came before the Privy Council pursuant to leave to appeal granted by Mr. Justice HODGES. The Attorney-General for the Commonwealth intervened for the purpose of securing the representation of Commonwealth views and interests. Counsel for the Commonwealth raised two preliminary objections ; first, that no appeal could be brought against the decision of the Supreme Court of Victoria which decision had been made by the Judiciary Act “ final and conclusive,” subject only to appeal to the High Court ; that an appeal could only be

brought to the Privy Council by special leave of the Privy Council and that there were no grounds for such leave being granted. Such constitutional questions, it was argued, should be dealt with exclusively by the High Court of Australia. The Privy Council did not deal with these preliminary objections in the usual way; it proceeded with the hearing of the whole appeal and finally reserved its judgment for further consideration. It was not till 6th December 1906 that the judgment of their Lordships was delivered by the Earl of HALSBURY. Instead of dealing with the preliminary objections at the outset, the judgment proceeded to deal with the main issues and questions involved namely:—Whether the respondent, an officer of the Commonwealth, was liable to be assessed for State income tax in respect of his Federal salary. After having decided that the judgment of the Supreme Court in favour of the respondent ought to be reversed, and that his salary in question was rightly included in the State assessment, the Board proceeded to deal with the preliminary objections in these words, “With respect to the objections urged both as a preliminary objection and one of substance to the hearing of the appeal, at all, by this Court, their Lordships are disposed to adopt the reasoning of the Supreme Court in giving leave to appeal. The only basis upon which the objections can be suggested to be founded is the Commonwealth Act and no direct authority under that Act has been shown.” Copious extracts from the judgment of Mr. Justice HODGES were cited with approval but no expression of opinion whatever was given on the vital point raised that an appeal would not lie to the Privy Council without special leave being granted by that body. The result was that the appeal was allowed and Mr. Outtrim was required to pay State income tax. There was no order for costs of the appeal as between the appellant and the respondent, but the Commonwealth was ordered to pay the appellant the costs of its intervention: (1907) A.C. 81.

This decision of the Privy Council, given after a delay of 18 months, may be regarded as one of the most unsatisfactory deliverances on record in connection with the judicial interpretation of the Constitution of the Commonwealth. It may be justly cited as justifying the wisdom of the framers of the Constitution in taking steps to prevent the decision of Australian constitutional questions being diverted to the Privy Council except in cases where the High Court grants a special certificate authorizing such appeal.

**Webb v. Outtrim in the High Court.**

Flushed with a sense of victory in the result of *Webb v. Outtrim* in the Privy Council, the various State authorities early in 1907, proceeded to take legal proceedings against Commonwealth officers to enforce payment of State income tax. The attack was commenced in New South Wales in the case of *Commissioner of Taxation v. Baxter*, (1907) 4 C.L.R., 1087, and in Victoria in the case of *Commissioner of Taxes v. Flint*, 4 C.L.R., 1178. Mr. Baxter, an officer of the Commonwealth service, residing in Sydney, was assessed by the Commissioner and, having refused to pay taxes, he was sued in the District Court for the amount of the tax. At the hearing before District Court Judge MURRAY, Baxter contended that, on the authority of the High Court's decision in *Deakin v. Webb*, 1 C.L.R., 585, he was not liable. The learned Judge, however, following the decision of the Privy Council in *Webb v. Outtrim*, (1907) A.C., 81 ; 4 C.L.R., 356, decided against Baxter's contention, and found a verdict for the Commissioner for the amount claimed. From that decision Baxter appealed to the High Court.

In the High Court, a preliminary objection was taken against the appeal being entertained ; it was alleged that the verdict against Mr. Baxter was given in a State Court in the exercise of State jurisdiction and therefore, no appeal would lie to the High Court in Federal jurisdiction. This was, in fact, a revival of the reasoning adopted by Mr. Justice HODGES in granting leave to appeal in *Webb v. Outtrim*. It was further argued that as the Privy Council had declared that the part of section 39 of the Judiciary Act purporting to take away the right of appeal was *ultra vires*, the whole section was invalid and therefore there was no valid section giving Federal jurisdiction to the State Courts.

In reply to this the Chief Justice (Sir SAMUEL GRIFFITH) pointed out that the Judiciary Act, section 39, had taken away State jurisdiction and had conferred on the State Courts Federal jurisdiction to deal with cases arising under the Constitution or involving its interpretation. "It was not necessary," he said, "to decide whether before the establishment of Federal Courts the State Courts were, in determining such questions, exercising Federal jurisdiction or not, for in the Judiciary Act the Parliament undertook to use the powers conferred by section 75. This they did by section 39 of that Act, which enacts in the first place that the juris-

diction of the High Court, i.e., its power to exercise the judicial power of the Commonwealth, shall be exclusive of the jurisdiction of the several Courts of the States except as provided by that section. Without the proviso the jurisdiction of the State Courts would have been entirely ousted. But the Parliament might on the next day have passed another law investing the State Courts with Federal jurisdiction. And the fact that they proceeded to do so by the same Act can make no more difference in the result than the fact that a power of revocation and new appointment is exercised by one instrument instead of two. The result is that the jurisdiction of the State Courts is now derived from a new source, with all the incidents of jurisdiction derived from that new source, one of which is an appeal in all cases to the High Court."

Mr. Justice ISAACS held that State jurisdiction was the authority which State Courts possess to adjudicate under the State Constitutions and laws; Federal jurisdiction was the authority to adjudicate derived from the Commonwealth Constitution and laws. The first is that which "belongs to" the State Courts within the meaning of section 77; the latter must be "vested in" them by Parliament. Now section 77 (II.) is a power to exclude jurisdiction, and this power has been exerted in this first sub-section of section 39, the result being that, so long as the provision stands unrepealed, no State jurisdiction can exist. Section 77 (III.) on the other hand, is a power to invest with Federal jurisdiction, not to restore State jurisdiction, and an exercise of that power in sub-section (2) of section 39 of the Judiciary Act is no contradiction of the deprivation contained in the prior sub-section, and works no restoration of the State jurisdiction. It is, therefore, clearly an error to say that the Federal Parliament has in the same section purported to take away and to return the same jurisdiction, with or without the power of appeal to the Privy Council, or that the conjoint effect of sub-sections (1) and (2) of section 39 of the Judiciary Act is to leave the jurisdiction of the State Courts as it previously stood. They still have jurisdiction in respect of the same subject matters, but their authority to exercise judicial power with regard to those matters springs from another source quite as much as if an Imperial Act had enacted by one section that their State jurisdiction should cease, and by the next section that henceforth they should have similar jurisdiction but should exercise it under the authority of that Statute. The authority which is given by section 39—namely, Federal jurisdic-

tion—has never been taken away, because it had never “belonged” to a State Court; that which was taken away—namely State jurisdiction—has never even nominally been returned. Section 39 (2) confers “Federal jurisdiction” only; none other is in the power of the Commonwealth Parliament to grant, and in the result either the State Courts possess Federal jurisdiction only in these matters or they possess none at all.”

“I feel no doubt that the State Courts in these cases possessed, and necessarily exercised Federal jurisdiction, and that these appeals are competent.” *Per* ISAACS, J., 4 C.L.R., at pp. 1142-1145.

### **Baxter v. Commissioner of Taxation.**

The preliminary objection having been over-ruled, the Court proceeded to deal with the main constitutional issues involved, namely, the liability of Commonwealth officers to State taxation. The majority of the Court, *per* GRIFFITH, C.J., BARTON and O'CONNOR JJ. held that the High Court was, by the Constitution, the ultimate arbiter upon all such questions, unless it was of opinion that the question at issue in any particular case was one upon which it should submit itself to the guidance of the Privy Council. It was, therefore, not bound to follow the decision in *Webb v. Outtrim*, (1907) A.C., 81, but should follow its own considered decision in *Deakin v. Webb*, (1901) 1 C.L.R., 585, in which it had refused to grant a certificate under section 74, unless upon a reconsideration of the question for whatever reason it should come to a different conclusion. Assuming the fact that the Privy Council had given a decision in direct conflict with the High Court on the same point to be a sufficient reason for a reconsideration of the whole matter by the High Court, there was nothing in the reasons of the Judicial Committee to throw any new light on the question involved, either with regard to the necessity for the implication of the rule of implied prohibition laid down in *M'Culloch v. Maryland*, 4 Wheat., 316, and adopted in *D'Emden v. Pedder*, 1 C.L.R., 91, or as to the applicability of the rule to the particular question. The rule in *D'Emden v. Pedder*, 1 C.L.R., 91, was therefore reaffirmed and the appeal was allowed: *Baxter v. Commissioner of Taxation* (N.S.W.), (1907) 4 C.L.R., at p. 1088.

Mr. Justice ISAACS was of opinion that, apart from any consideration of its history, the words of section 74 of the Constitution were clear and strong enough to lead to the conclusion that on questions coming within the section the decision of the High Court was final, and, therefore, the Court had a right to decline to follow

the decision of the Privy Council upon any such question, but the respect and weight due to the judgment of the Privy Council made it the duty of the High Court under the circumstances to re-consider the question decided in *Deakin v. Webb*, 1 C.L.R., 585. Further consideration, in the light of the decision in *Webb v. Outtrim*, (1907) A.C., 81, left the authority of *D'Emden v. Pedder*, 1 C.L.R., 585, unimpaired, but the Land and Income Tax Act of New South Wales, considered apart from authority, could not be regarded as an infringement of the rule of non-interference laid down in the latter case.

Mr. Justice HIGGINS held that the King in Council being still the appellate Court from the High Court, and the High Court a Court from which appeal can be brought to the King in Council, it was the duty of the High Court to accept the decision of the King in Council as the final statement of the law. The Land and Income Tax Act of New South Wales was not, in his opinion, an interference with Federal instrumentalities.

The whole Court held that even if section 39, sub-section (2) (a) of the Judiciary Act 1903 purported to take away the right of appeal to the Privy Council, and the section was to that extent *ultra vires* and inoperative, its failure in that respect did not affect the validity of the grant of Federal jurisdiction to State Courts contained in the rest of the section and the consequent right of appeal to the High Court. The certificate for leave to appeal to the Privy Council was refused.

### **Flint v. Webb.**

The case of *Flint v. Webb*, which was a similar proceeding by the Victorian Commissioner of Taxes to recover State income tax against Arthur L. Flint, a Commonwealth officer, was argued in the Melbourne sittings of the High Court in May 1907 and the decision of the main question was given at the same time as that in *Baxter's Case* and was to the same effect. Consequently notwithstanding the decision of the Privy Council in *Webb v. Outtrim*, the whole of the Commonwealth officers, except Mr. Outtrim, by the decision of the High Court, escaped State taxation: 4 C.L.R., 1178.

#### Proceedings against Commonwealth or State.

78. The Parliament may make laws conferring rights to proceed against the Commonwealth<sup>143</sup> or a State in respect of matters within the limits of the judicial power.

**§ 143. "PROCEED AGAINST THE COMMONWEALTH."**

By the Judiciary Act 1903, Part IX., provision is made for the institution and conduct of suits by and against the Commonwealth and the States, as follows :—(1) Suits in contract or tort of any person against the Commonwealth. (2) Suits in contract or tort of any person against a State in respect of a matter in which the High Court has jurisdiction. (3) Suits in contract or tort by a State against the Commonwealth. (4) Suits by a State against a State. (5) Suits by the Commonwealth. No execution or attachment, or process in the nature thereof, shall be issued against the property or revenues of the Commonwealth or a State in any such suit ; but when any judgment is given against the Commonwealth or a State, the Registrar shall give to the party in whose favour the judgment is given a certificate in the form of the Schedule to this Act, or to a like effect. On receipt of the certificate of a judgment against the Commonwealth or a State the Treasurer of the Commonwealth or of the State as the case may be shall satisfy the judgment out of moneys legally available. When in any such suit a judgment is given in favour of the Commonwealth or of a State and against any person, the Commonwealth or the State, as the case may be, may enforce the judgment against that person by process of extent, or by such execution, attachment, or other process as could be had in a suit between subject and subject.

**Claims against the Commonwealth.**

In an action brought by Thomas Henry Gyton against Frank Leon Outtrim, Deputy Postmaster-General of Victoria to recover damages for injuries sustained by reason of the negligence of persons in the service of the Commonwealth it was held by Mr. Justice Hoon that apart from Statute the Crown was not liable for the negligence of its employees. Taking that proposition to be correct, he said, until the Claims against the Government Act 1902 was passed there was no cause of action against the Commonwealth because the Commonwealth was not liable for the wrongful act of the person who caused the injury. Then that Act steps in and practically enacts that the Commonwealth shall be liable for the wrongful act of its servants and employees, so completing a cause of action at that time incomplete. That shows that the Act is not a mere procedure Act : *Gyton v. Outtrim*, (1904) 29 V.L.R., 646 ; 25 A.L.T., 174 ; 10 A.L.R., 67.



**Action for Tort against the Commonwealth.**

The Commonwealth is responsible in an action for the tortious acts of its servants in every case in which the gist of the cause of action is an infringement of a legal right, if the act complained of is not justified by law, and the person doing it is not exercising an independent discretion imposed upon him by Statute, but is performing merely a ministerial duty. The Collector of Customs, New South Wales, pending the passing of entries, took and detained certain imported goods liable to *ad valorem* duty for the purpose of ascertaining their true value for duty, and upon the passing of the entries delivered the goods to the importer. It was decided by the High Court that, in refusing to pass entries until the ascertainment of the true value for duty, the Collector was performing a quasi-judicial duty prescribed by the Statute to be performed by him personally, in the performance of which he was required to exercise independent judgment on a preliminary question of fact, and that an action would not lie against the Commonwealth for a wrongful refusal to pass entries owing to a mistake of facts or even *mala fides* on the part of the Collector. *Tobin v. The Queen*, 16 C.B.N.S., 310, and *Enever v. The King*, 3 C.L.R., 969, followed. *Barry v. Arnaud*, 10 A. & E., 646, and *Barrow v. Arnaud*, 8 Q.B., 595, distinguished. It was further held, that the neglect or refusal by the Customs Department to furnish the importer with copies of books and documents impounded or retained under sections 214 and 215 of the Customs Act 1901 was a breach of an absolute duty cast by the latter section on the department, for which an action would lie against the Commonwealth; and that, though the impounding and retaining of the books and documents in the first instance were justified by the Act, the unreasonable detention of them after the expiration of the period necessarily occupied in the ascertainment of the value of the goods was unlawful, and rendered the Commonwealth liable to an action for conversion; but that, in either case, the damages recoverable were limited to the pecuniary loss actually suffered by the plaintiff by reason of the wrongful acts: *Baume v. Commonwealth*, (1906) 4 C.L.R., 97.

**Tortious act of Commonwealth Servant.**

In the case of *Strachan v. The Commonwealth*, (1906) 4 C.L.R., 455, the plaintiff, owner of a British ship called the *Envy* brought an action against the Commonwealth to recover damages in respect of alleged wrongful acts of officers of the British Possession of New

Guinea in May 1905, before the Parliament of the Commonwealth had passed any legislation for the Government of New Guinea as a territory of the Commonwealth. It was held by the High Court that until such legislation took place, and the proclamation consequent thereon was made, no such relationship of master and servant existed between the Commonwealth Government and the officials of the possession as would render the Commonwealth liable in an action of tort for wrongful acts of such officers : *Tobin v. The Queen*, 16 C.B.N.S., 310, applied.

#### Number of Judges.

79. The federal jurisdiction of any court may be exercised by such number of judges<sup>144</sup> as the Parliament prescribes.

#### § 144. "SUCH NUMBER OF JUDGES."

Under this section, the Parliament has power to prescribe the number of Judges, required to exercise jurisdiction, not only in the case of Federal Courts, but also of State Courts invested with Federal jurisdiction under section 77 (III). *Per GRIFFITH, C.J., Commissioners of Taxation v. Baxter*, 4 C.L.R., at p. 1145. This power has been exercised with respect to State Courts by section 17 of the Judiciary Act 1903-1910, which invests the Supreme Courts with jurisdiction, to be exercised by a single Judge, with regard to chamber applications in matters pending in the High Court in cases where the jurisdiction of the High Court is not exclusive.

As regards the High Court, sections 15, 16 and 18 of the same Act define the jurisdiction of single Justices in Court and Chambers. Sections 19-22 define the jurisdiction of a "Full Court"; which, in appeals from judgments of a single Justice of the High Court or of a State Supreme Court exercising Federal jurisdiction, or from judgments of inferior State Courts or of the Inter-State Commission, or in applications for leave to appeal from judgments of State Courts, may consist of two or more Justices, and in appeals from State Supreme Courts and applications for a certificate enabling an appeal from the High Court to the Privy Council must consist of not less than three Justices. By section 23, as amended by the Judiciary Act 1912, it is provided that a Full Court consisting of less than all the Justices shall not give a decision on a question affecting the constitutional powers of the Commonwealth, unless a majority of

all the Justices concur in the decision. By the same Act it was provided that when the Justices sitting as a Full Court are divided in opinion as to the decision to be given on any question, the question shall be decided according to the decision of the majority, if there is a majority ; but if the Court is equally divided in opinion—(a) in the case where a decision of a Justice of the High Court (whether acting as a Justice of the High Court or in some other capacity), or of a Supreme Court of a State or a Judge thereof, is called in question by appeal or otherwise, the decision appealed from shall be affirmed ; and (b) in any other case, the opinion of the Chief Justice, or if he is absent the opinion of the senior Justice present, shall prevail."

Part XII. of the Principal Act, passed and added in 1910, confers on the High Court jurisdiction to hear and determine any question of law referred to it by the Governor-General as to the validity of any Act or enactment of the Parliament : requires the matter to be heard and determined by a Full Court consisting of all the Justices, except such as may be absent from the Commonwealth or incapacitated by illness.

#### Trial by jury.

80. The trial on indictment of any offence against any law of the Commonwealth shall be by jury,<sup>145</sup> and every such trial shall be held in the State where the offence was committed, and if the offence was not committed within any State the trial shall be held at such place or places as the Parliament prescribes.

#### § 145. "SHALL BE BY JURY."

##### **Trial by Jury Defined.**

"It is the method of trial in which laymen selected by lot ascertain under the guidance of a Judge the truth in questions of fact arising either in a civil litigation or in a criminal process. The principle that a witness shall not be compelled to criminate himself has become a principle of British criminal law, departed from, no doubt, in special instances, as in the case of offences against the bankruptcy laws, but still maintained and administered as part of the great body of British criminal jurisprudence. But it is no part of the system of trial by jury, and the authority of the Parliament of the Commonwealth to create and punish offences as incidental

to the exercise of the powers conferred by the Constitution would certainly extend to the modification of any principle of British criminal law, no matter how fundamental, so long as the modification is not forbidden expressly or impliedly by the Constitution." *Miller's Constitution of the United States*, (1893), at p. 511.

### Self Incrimination.

In *Huddart Parker & Co. v. Moorehead*, 8 C.L.R., at p. 337 it was contended for the defendant appellant that the right to a trial by jury implied the ordinary common law incidents for the protection of an accused person; and therefore that section 15B of the Australian Industries Preservation Act 1906-1907, by granting powers of discovery which compelled the defendant to incriminate himself, offended against section 80 of the Constitution. The High Court, however, unanimously over-ruled the objection.

The Chief Justice (Sir SAMUEL GRIFFITH) said:—"It is sufficient to say that the doctrine expressed by the maxim *nemo tenetur seipsum accusare* was introduced into English law long after the institution of trial by jury; that its application has frequently been excluded by Statutes in the case of indictable offences (e.g., offences against the bankruptcy laws); and that the rule is rather one of evidence than one relating to trial by jury": 8 C.L.R., 358.

Mr. Justice ISAACS said:—"The essence of the objection is that self-incrimination is inconsistent with trial by jury. No direct authority was or could be adduced in support of this contention; but several cases were cited which were decided upon the Fifth Amendment of the American Constitution declaring that no person 'shall be compelled in any criminal case to be a witness against himself.' . . . The American Courts never, so far as I am aware rested this principle on the jury system. Section 80 of our Constitution retains, in respect of trials on indictment for Commonwealth offences, the provision of Magna Charta that the issue shall be determined '*per legale iudicium parium suorum*,' so jealously preserved in the American Constitution. The whole meaning and essence of the requirement is that a jury, and not a judicial officer, shall pronounce on the guilt or innocence of the accused. But the rule as to self-incrimination is outside the scope of that provision; it is still a mere evidentiary rule, applicable to all criminal offences, indictable or otherwise, and open like all rules of evidence to Parliamentary regulation": 8 C.L.R., at pp. 385-386.

**No Appeal against Acquittal by Jury.**

In the prosecution of an indictment before a Judge of the Supreme Court of South Australia for attempting to trade with the enemy contrary to the provisions of the Trading with the Enemy Act (1914), the jury, by the direction of the presiding Judge, found a verdict of not guilty. Thereupon he entered a judgment of acquittal and the accused was discharged. The Crown applied to the High Court for special leave to appeal under section 73 of the Constitution from the judgment or alternatively from the direction of the Judge. It was held by the majority of the High Court, GRIFFITH, C.J. and GAVAN DUFFY, POWERS and RICH, JJ. (ISAACS and HIGGINS, JJ. dissenting) that special leave to appeal should be refused. *The King v. Snow*, (1915) 20 C.L.R., at p. 315.

In this case leave was refused by GRIFFITH, C.J. and GAVAN DUFFY and RICH, JJ., as to the judgment of acquittal, on the ground that although under section 73 of the Constitution the High Court has jurisdiction to entertain an appeal from a judgment discharging an accused person, that section does not confer jurisdiction on the High Court to set aside a verdict of "not guilty," so that, when, as in this case, the judgment properly followed the verdict, the granting of special leave to appeal would be futile; and, as to the direction of the learned Judge, on the ground that it was not a "judgment" from which under section 73 an appeal lies to the High Court. Mr. Justice POWERS based his decision on the ground that although under section 73, the High Court had jurisdiction to entertain an appeal from the judgment of acquittal, to set aside the verdict and to grant a new trial, the discretion to grant special leave should not in the circumstances be exercised: 20 C.L.R., 315-316.

The Chief Justice (Sir SAMUEL GRIFFITH) said:—"The common law doctrine as to the effect of a verdict of acquittal is too well settled to require exposition, and it is too late to inquire into its origin. If it had been intended by the framers of the Constitution to abrogate that doctrine in Australia, and to confer upon the High Court a new authority, such as had never been exercised under the British system of jurisprudence by any Court of either original or appellate jurisdiction, it might have been anticipated that so revolutionary a change would have been expressed in the clearest language. Section 80 lays down as a fundamental law of the Commonwealth that the trial on indictment of any offence.

against any of the laws of the Commonwealth shall be by jury. The framers of the Constitution, the electors who accepted it, and the Parliament which enacted it, must all be taken to have been aware of the absolute protection afforded by verdict of not guilty under the common law of all the States. With this knowledge they thought proper to enact that any indictable offence that might be created by the new legislative authority established by the Constitution should also be tried by jury. The history of the law of trial by jury as a British institution (not forgetting the Act called Fox's Libel Act) is, in my judgment sufficient to show that this provision ought, *prima facie* to be construed as an adoption of the institution of "trial by jury" with all that was connoted by that phrase in constitutional law and in the common law of England. *Per* GRIFFITH, C.J., 20 C.L.R., at pp. 322-323.

#### **Not Applicable to Territories.**

The provisions of Chapter III. of the Constitution, including section 80, are limited in application to the exercise of the judicial power of the Commonwealth in respect of those functions of Government as to which it stands in the place of the States, and has no application to territories. Section 80, therefore, relates only to offences created by the Acts of Parliament passed in the execution of those functions which are aptly described as "laws of the Commonwealth." The subordinate Legislature of a territory, such as Papua, can pass a law providing that the trial of persons of European descent charged with a crime punishable with death should be held before a jury of four persons, but that, "save as aforesaid the trials of all issues, both civil and criminal, shall as heretofore, be held without a jury." *The King v. Bernasconi*, (1915) 19 C.L.R., 633.

"Section 80 of the Constitution is one of a *fasciculus* of sections collected in one chapter and united and inter-related as members of a distinct group under the title of 'The Judicature.' The whole judicial power of the Commonwealth proper is there dealt with. By force of the various sections of Chapter III., other than section 80, and aided by sub-section (xxxix.) of section 51, Parliament might have enacted, or might have enabled Courts to provide by rules, that all offences whatever should be tried by a Judge or Judges without a jury. Section 80 places a limitation on that power. Neither Parliament nor Courts may permit such a trial. If a given offence it is not made triable on indictment at all, then section 80

does not apply. If the offence is so tried, then there must be a jury. But the provision is clearly enacted as a limitation on the accompanying provisions, applying to the Commonwealth as a self-governing community. And that is its sole operation. When the Constitution, however, reaches a new consideration, namely, the government of territory, not as constituent parts of the self-governing body, not, "fused with it" as I expressed it in *Buchanan's Case*, 16 C.L.R., 315, at p. 335, but rather as parts annexed to the Commonwealth and subordinate to it, then section 122 provides the appropriate grant of power: *Per ISAACS, J. in The King v. Bernasconi*, 19 C.L.R., at p. 637.

#### Consolidated Revenue Fund.

81. All revenues<sup>146</sup> or moneys raised or received by the Executive Government of the Commonwealth shall form one Consolidated Revenue Fund, to be appropriated<sup>147</sup> for the purposes of the Commonwealth in the manner and subject to the charges and liabilities imposed by this Constitution.

#### § 146. "ALL REVENUES . . . TO BE APPROPRIATED."

#### LEGISLATION.

#### AUDIT ACT 1901-1909, Sections 36 AND 37.

Every appropriation made out of the Consolidated Revenue Fund for the service of any financial year shall lapse and cease to have any effect for any purpose at the close of that year. Any balance of the moneys so appropriated which may then be unexpended shall lapse and the accounts of the year shall be then closed. If the exigencies of the public service render it necessary to alter the proportions assigned to the particular items comprised under any subdivision in the annual supplies the Governor-General may, by order, direct that there shall be applied in aid of any item that may be deficient, a further limited sum out of any surplus arising on any other item under the same subdivision unless such subdivision shall be expressly stated to be "unalterable." Provision is made for the creation of a large number of trust accounts.

## SURPLUS REVENUE ACT 1908.

Where any trust account has been established under the Audit Acts, and moneys have been appropriated by the Parliament for the purposes of the trust account, or for any purpose for which the trust account is established, the appropriation shall not lapse at the close of the financial year for the service of which it was made; and the Treasurer may in any year (subject to section 87 of the Constitution) pay to the credit of the trust account, out of the Consolidated Revenue Fund, such moneys as the Governor-General thinks necessary for the purposes of the appropriation.

## § 147. "TO BE APPROPRIATED."

**Appropriation a Condition Precedent to an Action.**

In the case of *Cousins v. The Commonwealth*, (1906) 3 C.L.R., 529, the plaintiff, a letter carrier, sued to recover £1 arrears of salary based on his alleged due and accruing rights under section 84 of the Constitution coupled with section 19 of the Victorian Public Service Act (1900). One of the defences pleaded was as follows:—"The defendant says that the statement of claim is bad in law for that it is not herein alleged that the Commonwealth Parliament has appropriated any sum out of the consolidated revenue to pay the alleged salary claimed by the plaintiff. The defendant will rely upon section 78 of the Commonwealth Public Service Act 1902."

The case was decided against the plaintiff on another ground but referring to this defence the Chief Justice (Sir SAMUEL GRIFFITH) said:—"The other question is whether the statement of claim is good. Section 78 of the Commonwealth Public Service Act 1902 provides in sub-section 1 that:—'Nothing in this Act shall authorize the expenditure of any greater sum out of the consolidated revenue fund by way of payment of any salary than is from time to time appropriated by the Parliament for the purpose.' In the statement of claim it is not alleged that any greater salary than that which the plaintiff has received was appropriated. If, therefore, his claim depends on that Act, it is a fatal objection that it does not appear that Parliament has provided any money for the payment of a greater salary. In the case of *Bond v. The Commonwealth*, 1 C.L.R., 13, quite different considerations arose. There the obligations which had been imposed upon the Commonwealth by the Constitution had not been altered; here the only claim of the plaintiff, if he



claims under the Commonwealth Public Service Act 1902, is such a right as that Act gives him, and it is a defence that no greater sum of money has been voted by Parliament."

Expenditure charged thereon.

82. The costs, charges, and expenses incident to the collection, management, and receipt of the Consolidated Revenue Fund shall form the first charge thereon; and the revenue of the Commonwealth shall in the first instance be applied to the payment of the expenditure of the Commonwealth.

Money to be appropriated by law.

83. No money shall be drawn<sup>148</sup> from the Treasury of the Commonwealth except under appropriation made by law.

But until the expiration of one month after the first meeting of the Parliament the Governor-General in Council may draw from the Treasury and expend such moneys as may be necessary for the maintenance of any department transferred to the Commonwealth and for the holding of the first elections for the Parliament.

#### § 148. "NO MONEY SHALL BE DRAWN."

#### LEGISLATION

#### AUDIT ACT 1901-1910.

No money can be drawn from the Commonwealth public account except in the manner prescribed by this Act. See Procedure defined in sections 32-37.

Transfer of officers.

84. When any department of the public service of a State becomes transferred<sup>149</sup> to the Commonwealth,

all officers of the department shall become subject to the control of the Executive Government of the Commonwealth.

Any such officer who is not retained in the service of the Commonwealth shall, unless he is appointed to some other office of equal emolument in the public service of the State, be entitled to receive from the State any pension, gratuity, or other compensation, payable under the law of the State on the abolition of his office.

Any such officer who is retained in the service of the Commonwealth shall preserve all his existing and accruing<sup>150</sup> rights, and shall be entitled to retire from office at the time, and on the pension or retiring allowance, which would be permitted by the law of the State if his service with the Commonwealth were a continuation of his service with the State. Such pension<sup>151</sup> or retiring allowance shall be paid to him by the Commonwealth; but the State shall pay to the Commonwealth a part thereof, to be calculated on the proportion which his term of service with the State bears to his whole term of service, and for the purpose of the calculation his salary shall be taken to be that paid to him by the State at the time of the transfer.

Any officer who is, at the establishment of the Commonwealth, in the public service of a State, and who is, by consent of the Governor of the State with the advice of the Executive Council thereof, transferred to the public service of the Commonwealth, shall have the same rights as if he had been an officer of a department transferred to the Commonwealth and were retained in the service of the Commonwealth.

**§ 149. "DEPARTMENT . . . TRANSFERRED."****LEGISLATION.****COMMONWEALTH PUBLIC SERVICE ACT 1902, Sections 60-62.**

Where a department of the public service of a State has become transferred to the Commonwealth, every officer of such department who is retained in the service of the Commonwealth, or where any officer in the public, railway or other service of a State is transferred to the public service of the Commonwealth, every officer so transferred, shall preserve all his existing and accruing rights and shall be entitled to retire from office at the time and on the pension or retiring allowance which would be permitted by the law of the State from which he was transferred if his service with the Commonwealth were a continuation of his service with such State. For the purposes of this Act service in the public, railway, or other service of a State by any person who becomes an officer in the public service of the Commonwealth shall be reckoned as service in the public service of the Commonwealth. Any officer of a department transferred to the Commonwealth and any person in the public, railway, or other service of a State so transferred who has qualified to take any other position in the service of a State prior to such transfer shall in the service of the Commonwealth retain all the rights to promotion or transfer he possessed in the service of the State at the time of such transfer.

**§ 150. "EXISTING AND ACCRUING RIGHTS."**

Upon the transference of a department of a State to the Commonwealth the rights of the officers of the department are definitely ascertained and settled, and an officer in such a department who is retained in the service of the Commonwealth preserves all his "existing and accruing rights" under section 84 of the Constitution. Those rights include a right to be retained in the service at his then existing rate of remuneration until his engagement is terminated or its conditions are varied by a competent authority. Section 78 (1) of the Commonwealth Public Service Act has no operation upon the "existing rights" declared by section 84 of the Constitution to be preserved, and section 84 operates as a constitutional charge upon the Commonwealth revenue of a sufficient sum to give effect to it and as a sufficient authority to the Executive Govern-

ment of the Commonwealth to make the necessary payments to the person entitled to receive them: *Bond v. The Commonwealth* (1903) 1 C.L.R., 13.

The Public Service Act 1900 of Victoria, section 19, passed in anticipation of Federation, provided that "From the commencement of this Act every officer of the Trade and Customs, Defence, and Post and Telegraph Departments shall be entitled to receive a salary equal to the highest salary then payable to an officer of corresponding position in any Australian Colony. Provided that this section shall not entitle any officer to receive more than £156 per annum." It was held by the High Court that this section only entitled such an officer to receive a present salary equal to the highest salary which, on the day the Act came into force, was then actually payable to an officer of corresponding position, etc., and did not entitle such officer to increases of salary which, under the law then in force in the particular Colony, might thereafter from time to time become payable to an officer of corresponding position: *Miller v. The Commonwealth*, (1904) 1 C.L.R., 668.

The Public Service Act 1900, of Victoria, section 19, was merely a temporary provision to fix the status of the officers therein referred to when they should be transferred with their departments to the Commonwealth. That section, therefore, does not, notwithstanding section 84 of the Constitution restrict the power of the Commonwealth Parliament to reduce the salaries of officers of Victorian Government departments transferred with those departments to the Commonwealth. The provisions of the Commonwealth Public Service Act 1902, purporting to affect the salaries of officers in the public service of the Commonwealth, apply to officers transferred with their departments from the several States to the Commonwealth as well as to other officers in that service, even if the effect in particular cases is to reduce the salaries those officers are entitled to receive when such departments were so transferred: *Cousins v. The Commonwealth*, (1906) 3 C.L.R., at pp. 529-530.

In the case of *Cousins v. The Commonwealth*, (1906) 3 C.L.R., 530, the following question was raised for the decision of the Court, viz., whether it is competent for the Commonwealth Government under the provisions of the Constitution and the Commonwealth Public Service Act 1902 to reduce the salary of the plaintiff to an amount less than that to which he was entitled under section 19

of the Public Service Act of Victoria (1900) at the date of the transfer of the Post and Telegraph Department to the Commonwealth.

James Cousins, a letter carrier brought an action in the High Court against the Commonwealth claiming £1 arrears of salary for the month of November, 1905. He had been a letter carrier in the Post and Telegraph Department of Victoria, and when that department was transferred to the Commonwealth he was entitled to a salary of £150 a year; that he received from the Commonwealth salary at that rate up to October 31st, 1905, but for the month of November, 1905, he only received salary at the rate of £138 a year: although under the Constitution and the Commonwealth Public Service Act 1902 he was entitled to £150 a year. By its defence the defendant stated that under the Commonwealth Public Service Act 1902, the Public Service Commissioner had, after full inquiries, classified and graded the plaintiff; that a regulation had been made by the Governor-General fixing the maximum pay for the plaintiff's grade at £138 a year; and that on the Commissioner's recommendation the Governor-General had approved of the grading of the plaintiff and of his being paid £138 a year.

On the plaintiff's behalf it was argued that the Commonwealth Parliament has no power to reduce the salary of the plaintiff below that which he was entitled to receive from the State of Victoria when the Post and Telegraph Department was taken over by the Commonwealth, viz., £150 a year. In *Bond v. The Commonwealth of Australia*, 1 C.L.R., 13, it was decided that under section 84 of the Constitution the plaintiff is entitled to that £150 a year until it is altered by some competent authority. That sum is an irreducible minimum. By section 19 of the Public Service Act 1900 (Victoria) the plaintiff was given a right to that salary.

That was a right which the Victorian Parliament could have taken away at any time before the Post and Telegraph Department was taken over by the Commonwealth. But a bargain was made embodied in section 84 of the Constitution, and its effect was, that when the department is transferred to the Commonwealth, the Commonwealth agrees not to take away the rights which officers in that department then have. One of those rights was to a minimum salary of £150 a year. That bargain having been confirmed by the Constitution, the plaintiff's title became indefeasible, except by an Imperial Act, or by an amendment of the Constitution.

For the Commonwealth it was contended that the term "existing rights," in section 84 of the Constitution cannot be read literally, *i.e.*, the rights after transfer to the Commonwealth cannot be exactly the same as those which existed under the State. For instance, an officer in a Victorian department which was transferred could not claim to be employed only in Victoria. The intention of section 84 is that, so far as rights could be dealt with by the State Parliament or by the State Executive, they are to be capable of being dealt with by the Commonwealth Parliament or by the Commonwealth Executive. Section 107 of the Constitution deprives the State Parliament of the power it had to alter the salaries of these officers. Section 52 of the Constitution vests in the Commonwealth the power to deal with the salaries of transferred officers, including the power to reduce their salaries. The effect of section 84 of the Constitution is that officers of transferred departments have the same rights, subject to the control of the Commonwealth Parliament, that they had before the transfer subject to the control of the State Parliament. The function of section 19 of the Public Service Act 1900 (Victoria) was exhausted when the salaries at the date of the passing of that Act were ascertained: *Miller v. The Commonwealth*, 1 C.L.R., 668. The Commonwealth Parliament having power to deal with the salaries of transferred officers, have exercised that power by the Commonwealth Public Service Act 1902. The fact that in section 60 of that Act the terms of section 84 of the Constitution are re-enacted shows that the Parliament of the Commonwealth did not regard section 84 as interfering in any way with their right to legislate with regard to officers of transferred departments, for they did in terms legislate with regard to them by various sections of the Commonwealth Public Service Act 1902.

The Chief Justice (Sir SAMUEL GRIFFITH) in delivering the judgment of the Court said:—"Reading the section of the Public Service Acts of Victoria the apparent intention of the Legislature was to deal with these departments, and to give the officers within them a certain standing in the public service of Victoria, which they would carry over with them when the departments were, as it was known they would be (one within a week and the other within two or three months) taken over by the Commonwealth. Such provisions had always been subject to the power of the Legislature to alter them, and it has been the practice to alter them from time to time, and to make other provisions, as in the instance quoted from the Public

Service Act 1890. That is good reason for supposing that this section was not intended to create a right which the Legislature of Victoria could not reasonably and fairly alter if it thought fit to do so. As to its power, there can be no doubt that the Legislature could have altered these salaries if the occasion arose. It appears then that the fixing of a salary was always treated as a temporary provision to last only until altered ; but there was a well-known formula used in legislation when the contrary was intended, that is to say, when it was intended to provide that such salaries should not be diminished during the continuance in office. That is the form of the provision in the Commonwealth Constitution as to the salaries of the Federal Judges, and a similar provision is made in the Constitution Acts of the States with respect to the salary of the Supreme Court Judges. In some cases the words are " during the continuance in office " ; in other cases " during the existence of the patent " or " commission." When, then, we find an Act fixing a salary without these words, it may reasonably be inferred as a matter of construction that it was not intended by the Legislature that these words should be read in."

" There is another reason, and I think a very cogent one, for coming to the same conclusion. This Act was passed in December, 1900, four days before the Commonwealth came into existence, and after the Constitution Act had been assented to by Her Majesty, and after the Proclamation had been published bringing it into operation. The Constitution was the result of a compact between the several Australian States, to which effect was given by Imperial legislation. One of the terms of the compact was that contained in section 84 ; and I think it must be taken that when the parties agreed to enter into that compact, they were aware of the laws of the several States by which the rights of officers in the departments of the several States were determined, and they were prepared to agree that all these rights were to be taken over by the Commonwealth when the departments were transferred to the Commonwealth.

" But it could not have been contemplated that after that compact was made and ratified by the Imperial Parliament, and was shortly to come into operation, any of these States should create an entirely new right to be imposed upon the other parties to the compact, without their consent. That is not to be supposed to have been the intention of the Legislature of Victoria, and, even if the words were more cogent than they are, I think it ought to be

attributed to the Legislature that they did not intend to impose any greater obligation on the Commonwealth than they had previously imposed upon themselves. It was known to the Victorian Legislature that they could not pass any law which the Commonwealth Parliament could not alter, unless prevented by section 84 of the Constitution from doing so. I think all these considerations point in the same direction, that section 19 of the Public Service Act 1900 ought to be construed as intended to be a merely temporary provision to fix the status of these officers when transferred to the Commonwealth Government, and the operation of which would then be exhausted."

"In the words of this Court in the case of *Miller v. The Commonwealth*, 1 C.L.R., 668 (a case arising under the same section) this section is to be construed just as if it had been recited in the Act that these departments were shortly about to be taken over by the Commonwealth Government, and that it was considered desirable definitely to determine what the status of the officers of those departments was to be when taken over."

"In my opinion, it did no more than fix their status in the Victorian service as members of that service, and gave them no greater privileges in any respect than other transferred civil servants possessed. That being so, the only right which the plaintiff took over was the right to receive his existing salary until lawfully reduced, and it was competent for the Commonwealth Parliament to reduce it." *Per* GRIFFITH, C.J., in *Cousins v. The Commonwealth*, (1906) 3 C.L.R., at pp. 538 to 540.

### § 151. "PENSIONS OR RETIRING ALLOWANCES."

#### Determination of Amount.

An officer of a department of the public service of New South Wales who, on the transfer of the department to the Commonwealth, was retained in the service of the Commonwealth, was afterwards called upon to retire under the provisions of section 65 of the Commonwealth Public Service Act 1902, and so became entitled by virtue of section 84 of the Constitution to a gratuity calculated in accordance with the scale provided by section 60, sub-section (ii) of the New South Wales Public Service Act 1895. It was held by the High Court that the discretion conferred by section 60, sub-section (ii) of the New South Wales Act as to the amount of the



Service Act 1890. That is good reason. The section was not intended to create a new right. Victoria could not reasonably and fairly do so. As to its power, there can be no doubt that it could have altered these salaries if it had then that the fixing of a salary was a mere provision to last only until altered by the formula used in legislation when the time came to say, when it was intended to provide that it not be diminished during the continuance of the form of the provision in the Commonwealth salaries of the Federal Judges, and the Constitution Acts of the States and the Supreme Court Judges. In some cases the continuance in office"; in other cases the "patent" or "commission." The fixing of a salary without these words is not as a matter of construction that it is a violation of the law that these words should be read.

"There is another reason, and I am coming to the same conclusion. This was in 1900, four days before the Commonwealth and after the Constitution Act had been in operation and after the Proclamation had been in operation. The Constitution was the law of the several Australian States, to which it was given effect by legislation. One of the terms of the compact was in section 84; and I think it must be agreed to enter into that compact, that the several States by which the rights of the several States were determined agreed that all these rights were to be determined by the wealth when the departments were transferred.

"But it could not have been a new compact was made and ratified by the States. It was shortly to come into operation. It was to create an entirely new right to be included in the compact, without their consent. It was to have been the intention of the Legislature that if the words were more cogent than the

... compensate ...  
... property passed ...  
... under this section ...  
... made as to the mode ...  
... and to determine ...  
... the Parliament ...  
... at the date of the ...  
... of ...  
... department

## FER OF PROPERTY OF STATE."

## LEGISLATION.

ITION ACT 1906, Sections 32, 36, 64.

before the commencement of this Act, has Commonwealth from any State or person, or on 85 of the Constitution become invested in shall for the purposes of this Act be deemed to under this Act, and to be invested in the Com-quired under this Act. Any State or person d under this Act may make a claim for com-d claim for compensation may be determined greement between the Minister and the claim- tion for compensation by the claimant against or (c) by a proceeding in a Federal or State ion of the Minister.

ENT ACT 1908, No. 24 of 1908, Section 4.

he compensation to be paid by the Common- to be acquired by the Commonwealth within to or acquired by the Commonwealth for the shall not exceed the value of the land on the d in other respects the provisions of the Lands shall apply to the acquisition of the land.

5.

ment of the Commonwealth, the States sur-ommonwealth took over, a large number of .nection with transferred departments which -ministered by the States. These properties post offices, customs houses, defence works cessary to the effective working of the trans- In the early days of the operation of the hen the Commonwealth was spending less arth " and paying unspent balances to the the payment of interest to the States on the red properties was not pressed. But after financial agreement was made to give the the population, the States began to press for ich had to be conceded.

gratuity, was vested in the Governor-General by virtue of section 70 of the Constitution : *New South Wales v. The Commonwealth*, (1908) 6 C.L.R., 215.

Transfer of property of State. 152

85. When any department of the public service of a State is transferred to the Commonwealth—

- (i.) All property of the State of any kind, used exclusively in connexion with the department, shall become vested in the Commonwealth ; but, in the case of the departments controlling customs and excise and bounties, for such time only as the Governor-General in Council may declare to be necessary :
- (ii.) The Commonwealth may acquire any property of the State, of any kind used, but not exclusively used in connexion with the department ; the value thereof shall, if no agreement can be made, be ascertained in, as nearly as may be, the manner in which the value of land, or of an interest in land, taken by the State for public purposes is ascertained under the law of the State in force at the establishment of the Commonwealth :
- (iii.) The Commonwealth shall compensate the State for the value of any property passing to the Commonwealth under this section : if no agreement can be made as to the mode of compensation, it shall be determined under laws to be made by the Parliament :
- (iv.) The Commonwealth shall, at the date of the transfer, assume the current obligations of the State in respect of the department transferred.

**§ 152. "TRANSFER OF PROPERTY OF STATE."****LEGISLATION.****LANDS ACQUISITION ACT 1906, Sections 32, 36, 64.**

Any land which, before the commencement of this Act, has been acquired by the Commonwealth from any State or person, or has by virtue of section 85 of the Constitution become invested in the Commonwealth, shall for the purposes of this Act be deemed to have been acquired under this Act, and to be invested in the Commonwealth as if acquired under this Act. Any State or person claiming to be entitled under this Act may make a claim for compensation. A disputed claim for compensation may be determined as follows :—(a) By agreement between the Minister and the claimant ; or (b) by an action for compensation by the claimant against the Commonwealth ; or (c) by a proceeding in a Federal or State Court on the application of the Minister.

**SEAT OF GOVERNMENT ACT 1908, No. 24 OF 1908, Section 4.**

The amount of the compensation to be paid by the Commonwealth for any land to be acquired by the Commonwealth within the territory granted to or acquired by the Commonwealth for the Seat of Government shall not exceed the value of the land on the 8th October 1908, and in other respects the provisions of the Lands Acquisition Act 1906 shall apply to the acquisition of the land.

**Transferred Properties.**

At the establishment of the Commonwealth, the States surrendered, and the Commonwealth took over, a large number of properties used in connection with transferred departments which had been previously administered by the States. These properties consisted mainly of :—post offices, customs houses, defence works and other buildings necessary to the effective working of the transferred departments. In the early days of the operation of the "Braddon Clause" when the Commonwealth was spending less than its "Federal Fourth" and paying unspent balances to the States, the question of the payment of interest to the States on the values of the transferred properties was not pressed. But after 1910 when the first financial agreement was made to give the States 25/- per head of the population, the States began to press for payment of interest which had to be conceded.

The following table shows the original values and particulars of the transferred properties :—

ORIGINAL VALUATION OF TRANSFERRED PROPERTIES.

State.	DEPARTMENT.				Total.
	Postmaster-General.	Defence.	Trade and Customs.	Home Affairs.	
	£	£	£	£	£
New South Wales ..	2,337,316	1,182,003	154,009	1,320	3,674,648
Victoria .. ..	1,332,862	805,389	190,657	1,266	2,330,174
Queensland .. ..	925,628	386,802	202,082	7,356	1,521,868
South Australia ..	842,281	161,140	28,486	815	1,032,722
Western Australia ..	600,895	64,842	37,714	835	704,286
Tasmania .. ..	214,906	121,490	48,212	143	384,751
Commonwealth	6 253,888	2,721,666	661,160	11,735	9,648,449

Since the original valuation was made there has been numerous additions to the list and at the present time the total value of transferred properties amounts to £10,781,797.

**Interest on Transferred Properties.**

The interest payable in the year 1918-19 on the value of properties transferred from the States to the Commonwealth will be as follows :—

	£
Defence—Military .. ..	88,500
The Navy .. ..	41,100
Trade and Customs .. ..	128,500
Works and Railways .. ..	410
Post Office .. ..	212,681
	<hr/>
	471,191

86. On the establishment of the Commonwealth. the collection and control of duties of customs and of excise,<sup>153</sup> and the control of the payment of bounties. shall pass to the Executive Government of the Commonwealth.

**§ 153. "CUSTOMS AND EXCISE."****Exclusive Power.**

The Customs Act 1901, being a valid exercise by the Commonwealth of the exclusive power to impose, collect and control duties of customs and excise conferred by sections 52 (II.), 86 and 90 of the Constitution, applies to goods imported by the Government of a State as well as to those imported by private persons; and, therefore, goods imported by a State, whether dutiable or not, are by section 30 of the Act subject to the control of the customs, and the authority of the State Executive is no justification for their removal from that control contrary to the provisions of the Act. A quantity of wire netting, which had been purchased in England and imported into the Commonwealth by the Government of New South Wales, was landed at the port of Sydney. Without any entry having been made or passed, and without the authority of the customs officers, the defendant, acting under the authority of the Executive Government of the State, removed the goods from the place where they were stored. In an action to recover a penalty, it was held by the High Court that the defendant had committed a breach of sections 33 and 236 of the Customs Act: *The King v. Sutton*, (1908) 5 C.L.R., 789.

87. During a period of ten<sup>154</sup> years after the establishment of the Commonwealth and thereafter until the Parliament otherwise<sup>155</sup> provides, of the net revenue of the Commonwealth from duties of customs and of excise not more than one-fourth shall be applied annually by the Commonwealth towards its expenditure.

The balance shall, in accordance with this Constitution, be paid to the several States, or applied towards the payment of interest on debts of the several States taken over by the Commonwealth.

**§ 154. "DURING A PERIOD OF TEN YEARS."****Surplus Customs and Excise Revenue.**

One of the most difficult problems of federation was the settlement of the financial relations of the Commonwealth and the States, rendered necessary by the withdrawal from the States of the immense

volume of revenue formerly received by them from the customs and excise duties. The total value of this revenue for the States before federation was at least £8,000,000 per year. Although this vast revenue was surrendered to the Commonwealth, the States were not relieved of a corresponding expenditure in connection with transferred departments and services. As a matter of fact the States were only relieved of the defence expenditure which amounted about £800,000 per year. It was accordingly made one of the terms of Federal Union that, during the first ten years, the Commonwealth should be entitled to apply annually not more than one-fourth of the net revenue from customs and excise towards Federal expenditure. The balance was to be paid to the several States or applied towards payment of interest on the debts of the States which might be taken over by the Commonwealth. "The Braddon Clause."

This was not an ideal financial scheme, but it was the best that could be advised under the circumstances. The main objection to it was that it lacked finality, that it was a temporary make-shift: that it allowed the Commonwealth to be a taxing body to raise customs and excise revenue, spending only one-fourth of that revenue for Federal purposes and handing over the unspent balances as an annual subsidy to the States. The States could spend this money without any sense of responsibility for the taxation which produced it; as far as the States were concerned there was a complete separation of taxation and expenditure. As regards the Commonwealth, its copious supplies of customs and excise revenue were handed over to the States in monthly balances without any anxiety as to the destination or use of that money once it reached the hands of the State Treasurers.

In the early years of federation the States received a bountiful supply of money from the Commonwealth under this arrangement. The following table shows the amounts actually paid to the several States during the financial years mentioned.

**Subsidies to all the States.**

				£
1901-2	..	..	..	7,368,137
1902-3	..	..	..	8,200,457
1906-7	..	..	..	7,845,574
1907-8	..	..	..	8,856,905
1908-9	..	..	..	7,930,395
1909-10	..	..	..	8,492,436
1910-11	..	..	..	5,603,191

It will be seen that the surplus Commonwealth revenue paid to the States in the year 1907-8 was higher than that paid on account of any other financial year. It represents the high water-mark of surplus revenue paid over to the States. In that year the shares of the several States were as follows :—

**Share of each State.**

State.	1907-8.
	£
New South Wales .. ..	3,617,472
Victoria .. ..	2,377,708
Queensland .. ..	1,038,267
South Australia .. ..	791,664
Western Australia .. ..	751,735
Tasmania .. ..	280,059
	<hr/> 8,856,905

The largeness of the amounts returned by the Commonwealth to the States during the year 1907-8 was to a great extent due to the increased customs and excise revenue collected under the new tariff of that year. In the year 1908-9, there was a considerable reduction in the surplus revenue paid to the States, this was due in part to the fact that at this time the Commonwealth either used or appropriated the whole of its revenue known as the "Federal Fourth," and did not return any unspent balances to the States. The whole tendency of Federal finances at this time was in the direction of termination of the "Braddon Clause" period and the readjustment of the financial relations of the Commonwealth and the States necessarily involving the gradual reduction in the Commonwealth subsidies to the States.

**The Financial Agreement 1909.**

In August 1909 the DEAKIN-COOK Ministry met representatives of the several States in conference at which the future financial relations of the Commonwealth and the States were considered. An agreement was arrived at which the representatives of the Commonwealth undertook to submit to Parliament together with a proposed amendment of the Constitution which was necessary in order to give legal and permanent effect to it. The alterations of the Constitution proposed were to the following effect :—(1) Termination of the operation of the 87th section of the Constitution (that is the Braddon section), on the 30th June 1910, or six months



earlier than it would terminate if the Constitution were allowed to remain unaltered. (2) Payment as from 1st July 1910 from the Federal Treasury to each of the State Treasurers of an amount equal to 25s. per head of the population of each State until further amendment of the Constitution. That provision was to take the place of the 87th section of the Constitution, under which hitherto three-fourths of the revenue from customs and excise had been handed back to the States.

The amendments were passed by the necessary majorities in the Senate and the House of Representatives and were submitted to the people in February 1910, but they did not receive the required ratification : *supra*, p. 21.

§ 155. "UNTIL THE PARLIAMENT OTHERWISE PROVIDES."

LEGISLATION.

SURPLUS REVENUE ACT, NO. 8 OF 1910.

**Cesser of Braddon Clause.**

By the Surplus Revenue Act of 1910, section 87 of the Constitution, commonly known as the "Braddon clause" was repealed and superseded by other compensating financial provisions for the States. By section 3 of that Act Parliament has "otherwise provided." It was declared and enacted that from and after 31st December 1910, the termination of the ten year period, section 87 of the Constitution shall cease to have effect, so far as it affects the power of the Commonwealth to apply any portion of the net revenue of customs and excise towards its expenditure, and so far as it affects the payment of any balance by the Commonwealth to the several States, or the application of such balance towards the payment of interest on the debts of the several States taken over by the Commonwealth.

Section 4 of the Act provided that during the period of ten years beginning on the 1st day of July 1910, and thereafter until the Parliament otherwise provides, the Commonwealth shall pay to each State by monthly instalments, or apply to the payment of interest on debts of the State taken over by the Commonwealth, an annual sum amounting to 25/- per head of the number of the people of the State.

A feature of this financial scheme was the special payment to be made to Western Australia during the period of 10 years as follows :—The Commonwealth shall, during the period of ten years beginning on the 1st July 1910 and thereafter, until Parliament otherwise provides, pay to the State of Western Australia, by monthly instalments an annual sum which in the first year shall be £250,000 and in each subsequent year shall be progressively diminished by the sum of £10,000. One-half of the amount of the payments so made shall be debited to all the States (including the State of Western Australia) in proportion to the number of their people, and any sum so debited to a State may be deducted by the Commonwealth from any amount payable to the State in pursuance of this Act.

After making the foregoing financial provision for the States in substitution of section 87 of the Constitution the Act in section 6 provided :—“ In addition to the payments referred to in section 4 of this Act, the Treasurer shall pay to the several States, in proportion to the number of their people, all surplus revenue (if any) in his hands at the close of each financial year.”

#### The Per Capita Subsidy.

Payments made by the Commonwealth to the States under the financial arrangement of 1910, were fairly large and substantial, averaging over £6,000,000 per year, as will be seen from the distribution in the following typical years :—

				£
1915-16	..	..	..	6,256,995
1916-17	..	..	..	6,180,419
1917-18	..	..	..	6,252,374
1918-19	..		(estimated)	6,351,250

In January 1919, a conference of Premiers was held in Melbourne to meet the Commonwealth Treasurer, in order to consider the approaching termination, in 1920, of the ten years' financial arrangement between the Commonwealth and the States. Representations were made to the Commonwealth Treasurer in favour of a continuance or renewal of the present *per capita* subsidy based upon payment of 25/- per head of the population. It was pointed out that none of the States would be in a financial position to do without the Commonwealth subsidy, that its reduction or abolition would mean a serious revolution in the finances of the States which

would leave the States unable to carry on the work of government and that their efforts in the direction of developing the resources of the country would be paralyzed. It was pointed out that the States had not only lost the customs and excise revenue which had originally belonged to them before federation, but that they had also lost the exclusive right to resort to land taxation, income taxation, and estate probate and succession duties. All these lucrative fields of taxation are now jointly occupied by the Commonwealth and the State taxing authorities. The Commonwealth has even taken possession of public entertainments as a source of income. On the other hand the burdens and responsibilities of the States instead of diminishing under federation have been increasing in leaps and bounds as shown by the State expenditure out of the consolidated revenue fund during the following years :—

**Annual Expenditure by all the States.**

				£
1901-2	..	..	..	29,231,385
1910-11	..	..	..	37,249,315
1915-16	..	..	..	50,078,039
1916-17	..	..	..	52,616,425

The States' debts had also gone on increasing and now amounted to the enormous total of £397,950,506.

On the other hand the Commonwealth Treasurer was able to point out that the financial obligations and burdens of the Commonwealth had gradually increased under federation, and, owing to the enormous expenditure involved in the prosecution of the war and provision for war pensions, the financial position of the Commonwealth in 1920 will be very serious indeed compared with its position in 1910, when the financial arrangement was legalized. The Commonwealth has now a national debt of £362,518,347 : *supra*, p. 55, which is mainly the result of war conditions, the interest on which would have to be provided for as well as a sinking fund. The Treasurer informed the representatives of the States that it would be impossible to hold out any hopes of any renewal of the financial scheme based on 25/- per head of the population, and the best they could expect would be a reduction of the subsidy on a sliding scale gradually reducing it to at least 10/- per head of the population.

**Reasons for Reduction of Subsidy.**

In support of the proposal to reduce the *per capita* subsidy to the States, the Commonwealth Treasurer, Mr. W. A. WATT, has pointed out that since the Federal Parliament determined in 1910 that the Commonwealth should pay to the States 25/- per head the Federal Government has had enormous additions to its responsibilities. During 1918-19, for example, it is estimated that the following sums must be paid out of the consolidated revenue in respect of the war :—

			£
Interest on war loans	..	..	13,551,650
Sinking fund on war loans	..	..	1,194,410
War pensions	..	..	5,000,000
Repatriation	..	..	1,000,000
Other recurring war expenditure	..	..	100,850
Total	..	..	20,846,910

These demands will recur annually, and all of them will greatly increase in amount. Expenditure on repatriation will be many millions sterling, and has to be borne, in accordance with the policy of the Ministry, partly out of revenue, and partly out of loan money. In 1910-11, the first year in which the States became entitled to the *per capita* payment, old-age pensions absorbed £1,868,648, while in 1918-19 it is estimated that the sum will be £3,925,000, an increase of £2,056,352, or more than double the cost of old-age pensions in 1910-11.

The Commonwealth is also confronted with a possibility of a decreasing revenue. It is probable, says the Treasurer, that higher protective duties will sooner or later cause a diminution of customs revenue, and a fall in prices may be experienced, which will result in a further shrinkage of that source of revenue. It is also inevitable that the proceeds of the Federal land tax will become less, because subdivision of large estates is proceeding. Revenue from the war time profits tax, estimated in 1918-19 at £1,800,000 will disappear altogether. Faced, therefore, with increasing and unavoidable expenditure, and with a falling off of revenue, the Commonwealth has proposed to ask Parliament to reduce the *per capita* payments to the States. Under the circumstances the Treasurer considers this is quite legitimate. The possibility that such a course would be necessitated was clearly in the minds of the framers of the Federal

Constitution, who gave the Commonwealth Parliament, after the ten years' period, the right, if need be, to use the whole of the receipts from customs and excise for Federal purposes. The Ministry does not propose, however, to take the whole of that revenue, but to leave the States 10/- per head of the population of each State.

War burdens, payable out of revenue, will certainly, for many years, amount to upwards of £25,000,000 annually. The proposed reduction of the *per capita* payment to the States will provide the Commonwealth with an additional amount of only about £4,700,000 per annum, leaving about £21,000,000 to be found by Federal taxation. The financial pressure is so great that all the resources of Australia must be levied upon. The States can help, both by economies and by the collection of additional revenue. They cannot expect the Commonwealth to suffer serious financial embarrassment while they go on their way as though the war had not occurred. The proposal to ask the States to find for themselves the £4,700,000, instead of looking to the Commonwealth for it, is not only moderate and reasonable, but is also a necessity.

#### Uniform duties of customs.

88. Uniform<sup>156</sup> duties of customs shall be imposed within two years after the establishment of the Commonwealth.

### § 156. "UNIFORM DUTIES OF CUSTOMS."

#### LEGISLATION.

#### CUSTOMS TARIFF 1902.

The first Act imposing uniform duties of customs came into operation on 8th October 1901, at 4 o'clock in the afternoon, reckoned according to the standard time in force in Victoria. See Note to Constitution, section 51 (II.) p. 317.

#### Payment to States before uniform duties.

89. Until the imposition of uniform duties of customs—

- (i.) The Commonwealth shall credit to each State the revenues collected therein by the Commonwealth.

(ii.) The Commonwealth shall debit<sup>157</sup> to each State—

- (a) The expenditure therein of the Commonwealth incurred solely for the maintenance or continuance, as at the time of transfer, of any department transferred from the State to the Commonwealth ;
- (b) The proportion of the State, according to the number of its people, in the other expenditure of the Commonwealth.

(iii.) The Commonwealth shall pay to each State month by month the balance<sup>158</sup> (if any) in favour of the State.

**§ 157. "DEBIT EXPENDITURE."**

**Meaning of Expenditure.**

The Commonwealth Parliament has authority to appropriate money out of the consolidated revenue for a specific purpose, and money so appropriated, although not yet actually disbursed, is "expenditure" within the meaning of section 89 of the Constitution, and cannot form part of the "surplus revenue" distributable among the States under section 94 until the actual disbursement of it for that purpose is no longer lawful or no longer thought necessary by the Government. Therefore the sums appropriated by the Old-Age Pensions Appropriation Act 1908 and the Coast Defence Appropriation Act 1908, were properly deducted from the revenue for the financial year in which the appropriations were made in order to ascertain the "surplus revenue" payable to the States in respect of that year under section 94 of the Constitution and section 4 of Surplus Revenue Act 1908. "Expenditure" does not necessarily mean disbursements actually made. In making up accounts for the purpose of striking a balance it may have a wider meaning." *Per GRIFFITH, C.J. in New South Wales v. The Commonwealth, (1908) 7 C.L.R., 179.*

"The money appropriated from the Consolidated Revenue Fund, withdrawn from the Treasury and paid to the credit of the two trust accounts was in my judgment expenditure within the meaning of the Constitution. It was lawfully devoted to the purpose expressed. While the appropriation stood it could not lawfully be devoted to any other purpose, though its disbursement might be deferred." *Per* BARTON, J. 7 C.L.R., at p. 196.

"I am of opinion, with my learned colleagues, that on the true construction of section 89, the word 'expenditure' includes not only the moneys actually paid, but the moneys which Parliament has appropriated to be expended until it finds that the money so appropriated is not wanted, that is to say, practically until the appropriation lapses. In this case, by the express provision of section 5 of the Surplus Revenue Act, the provisions of the Audit Acts (section 36), which make appropriations lapse at the close of the financial year, are made inapplicable to trust accounts such as those now in question. The word 'expenditure' has not, as was urged by plaintiffs' counsel, the primary meaning of moneys already expended. Primarily, indeed, it is an abstract noun; but it is often used to express collectively, in financial matters, moneys actually expended and to be expended." *Per* HIGGINS, J., 7 C.L.R., at p. 205.

### § 158. "BALANCE IF ANY."

#### Meaning of balance.

"I agree that the word 'surplus' in section 94 must be interpreted with reference to section 89, and that the surplus is the same thing as the aggregate amount of the balances which are required to be returned monthly to the States—no more and no less. The word 'expenditure' does not necessarily mean disbursements actually made, although that is its meaning in some contexts. But when it is used in a direction as to the mode of making up accounts for the purpose of striking a balance, it may have a wider meaning. The real question for determination is, in my opinion: What is the meaning of the words 'balance' and 'surplus' as used in sections 89 and 94. In a transaction between principal and agent, if the agent were required to pay over monthly to his principal all moneys collected for him after deducting disbursements made on the principal's behalf, I agree that the agent could only bring into account actual disbursements made by him in the course of the month.

But just as in the construction of a specification for a patent it is necessary to ascertain the subject-matter and the sense in which the words used would be understood by persons conversant with it, so is it in the construction of a Federal Constitution which regulates the relations between the Federal Government and the Governments of the States. These are by no means the same as those of principal and agent. Used in this connection, the word 'surplus' itself connotes some period of time over which the transactions which are to result in a surplus are to extend. The word is one commonly used in relation to public finance, and always as connoting such a period—often called the 'financial year.' This must be so from the nature of the case, since the operations of government are continuous and extend over long periods. The revenue is not collected, nor are disbursements made, in equal amounts from day to day, or from month to month. Thus it must happen that in one month the receipts largely exceed the disbursements, while in another the disbursements exceed the receipts. The word 'surplus' used in such a connection, must therefore be read in a sense which recognizes this condition and gives effect to it. And, since the divisible surplus under section 89 is made up of the aggregate of the balances payable month by month to the States, it follows that the balances themselves must be so calculated that the aggregate shall not exceed the amount of the surplus itself. It follows that, until the time has arrived at which the actual surplus is known, the calculation can only be approximate. For these reasons it is impossible to hold that the balances are to be finally struck as of the last day of every month. The plaintiffs rested their whole case upon this contention, which is in my judgment untenable." *Per GRIFFITHS C.J. in New South Wales v. The Commonwealth*, (1908) 7 C.L.R., 179.

"The strongest argument in favour of the plaintiffs is in the word 'balance' in section 89—the Commonwealth (after crediting to each State its share of the revenues, and debiting its share of the expenditure) is to pay to each State month by month 'the balance' (if any) in favour of the State. But this phraseology is quite consistent with the view of the word 'expenditure' which I have indicated. The States must ultimately get all moneys not actually paid by the Commonwealth; but before ascertaining the monthly balance payable to each State, the past and coming expenditure of the Commonwealth has to be taken into account: and the decision



of Parliament that money will be required for expenditure is not a decision which the judicial department should review." *Per* HIGGINS, J. 7 C.L.R., 205.

Exclusive power over customs, excise, and bounties.

90. On the imposition of uniform duties of customs the power of the Parliament to impose duties of customs and of excise, and to grant bounties on the production or export of goods, shall become exclusive<sup>159</sup>.

On the imposition of uniform duties of customs all laws of the several States imposing duties of customs or of excise, or offering bounties on the production or export of goods, shall cease to have effect, but any grant of or agreement for any such bounty lawfully made by or under the authority of the Government of any State shall be taken to be good if made before the thirtieth day of June, one thousand eight hundred and ninety-eight, and not otherwise.

**§ 159. "CUSTOMS AND EXCISE . . . EXCLUSIVE."**

**Exclusive Power.**

"Section 90 of the Constitution has made the power of the Federal Parliament exclusive as to customs and excise duties on and after a certain date, and after that date the laws of the several States on the subject 'cease to have effect'; so that there was no need of section 92 for the mere purpose of ending State customs duties. The word 'absolutely free,' I take to mean that not only State customs duties were to cease (section 90), but all State prohibitions of imports from other States—and there were such prohibitions (for instance, of grapes—long after the danger of phylloxera had ceased)." *Per* HIGGINS, J. in *Duncan v. Queensland*, (1916) 22 C.L.R., at p. 636.

**Duties of Excise distinguished from Licence Fees.**

In 1904 E. C. Bartley was charged before a Police Magistrate, under section 75 of the Liquor Act 1898 (N.S.W.), by Sergeant Peterswald, a district licensing inspector, that "on the 25th December, 1903, at Cootamundra, in the licensing district of Cootamundra,"

he "did carry on the trade or business of a brewer without holding a proper licence under the Liquor Act 1898 (No. 18) (N.S.W.)." He admitted that he did not hold a licence under the State Liquor Act, but contended that that Act, so far as it imposed licence fees upon brewers, was no longer in force, by virtue of section 90 of the Constitution, and that, as he held a licence under the Commonwealth Beer Excise Act (No. 7 of 1901), he was entitled to carry on the trade and business of a brewer in any part of the Commonwealth. The magistrate upheld the respondent's contention and dismissed the information, on the ground that the State licence fee was a duty of excise within the meaning of section 90 of the Constitution, and was therefore *ultra vires* of the State Legislature. The informant (inspector) appealed to the Supreme Court of New South Wales, and the appeal was dismissed. He then appealed to the High Court, which upheld the appeal, on the ground that brewers' licence fees are not duties of excise within the meaning of the Constitution, section 90.

The Chief Justice (Sir SAMUEL GRIFFITH), in delivering the judgment of the Court said :—"No doubt, in England in modern times there is a tendency to use the word 'excise' as including all kinds of inland revenue taxation which come under the control of the Commissioners for Inland Revenue. But it also appears that by a Statute, 23 & 24 Vict. c. 27, it was expressly declared that the licence fees specified in the Act, which included, amongst others, publicans' licences, should be deemed to be duties of excise for the purposes of that Act, and from that time onward we find the term has been used in England to include all these different classes of imposts. That argument seems to have prevailed in the Supreme Court, which held that, as the licence fee clearly came within the meaning of the term 'excise duty,' as used in England, it must, therefore, be taken that it was a duty of excise within the meaning of section 90, which conferred on the Commonwealth Parliament exclusive power to impose duties of customs and excise. Of course, the consequences of such a decision are very serious, for, if it is correct, the power to impose licence fees on publicans, for instance, has passed to the Commonwealth, as well as a large number of other fees, which, up to this time, have been thought to be within the power of the State to impose.

"In construing a Constitution like this it is necessary to have regard to its general provisions as well as to particular sections,

and to ascertain from its whole purview whether the power to deal with such matters was intended to be withdrawn from the States, and conferred upon the Commonwealth. The Constitution contains no provisions for enabling the Commonwealth Parliament to interfere with the private or internal affairs of the States, or to restrict the power of the State to regulate the carrying on of any businesses or trades within their boundaries, or even, if they think fit to prohibit them altogether. That is a very important matter to be borne in mind in considering whether this particular provision ought to be construed so as to interfere with the States' powers in that respect. If the majority of the Supreme Court were right, the Constitution will have given to the Commonwealth, and withdrawn from the States, the power to regulate their internal affairs in connection with nearly all trades and businesses carried on in the States. Such a construction is altogether contrary to the spirit of the Constitution, and will not be accepted by this Court unless the plain words of the provisions compel us to do so. Now the term 'duties of excise' does not appear to have been used in the larger sense in any of the legislative instruments cited before us except in certain English Statutes. The word 'excise' is, however, often used in America with that signification. What, then, does the term 'duties of excise' mean in the Constitution in the collocation in which we find it? On this point there is an interesting passage in the *Annotated Constitution of the Australian Commonwealth*, by Messrs. Quick and Garran. It is interesting as giving an historical account of the origin and use of the term. The passage which is at p. 837, is as follows:—"His Honor cited the passage and continued:—"That is, as far as we know, a correct historical statement of the use and growth of the term in England. With respect to the Australian use of the term, we are entitled to take notice of the sense in which it has been understood and used in the legislation of the various States. We know that in some of them there were in existence for many years 'duties of excise,' properly so called. imposed upon beer, spirits and tobacco. There were other charges which were never spoken of as excise duties, such as fees for publicans' licences, and for various other businesses, such as slaughterman's, auctioneers', and so forth, but these were not commonly understood in Australia as included under the head of excise duties. Bearing in mind that the Constitution was framed in Australia by Australians, and for the use of the Australian people, and that the word 'excise' had a distinct meaning in the popular mind, and that there were in

the States many laws in force dealing with the subject, and that when used in the Constitution it is used in connection with the words 'on goods produced or manufactured in the States,' the conclusion is almost inevitable that, whenever it is used, it is intended to mean a duty analogous to customs duty imposed upon goods either in relation to quantity or value when produced or manufactured, and not in the sense of a direct tax or personal tax. Reading the Constitution alone, that seems to be the proper construction to be put upon the term. That being so, the judgment of the Supreme Court, if it is to be supported at all, must be supported on some other ground than this."

"In this instance the subject-matter is one which the Legislature of New South Wales has power to regulate,—that is to say, the carrying on of any business—in the exercise of the police power of the State. It is not disputed that it can regulate the manufacture of an article, though it has no power to impose a tax upon the thing itself. From that point of view we look at the Statute in question to see whether it was passed for the purpose of regulating or controlling the manufacture of this particular article, beer. The Act provides in substance that a person who proposes to carry on the business of manufacturing beer must give the name and place where he intends to carry it on, and pay a licence fee. Whether there is also a Federal excise duty upon the manufactured beer is quite immaterial. Further, the licence not only empowers the licensee to manufacture beer, but entails the liability to have the premises entered by an inspector for the purpose of taking samples of the beer made there in order to ascertain whether there is any adulteration or not. The provision, therefore, is one of several conditions imposed upon the manufacturer for regulating the trade, which is one of the primary functions of a State Legislature."

"The case of *Bank of Toronto v. Lambe*, 12 App. Cas., 582, is an authority for saying that, *prima facie*, a licence fee of this sort is not a tax on the goods themselves. Rejecting, then, the larger view as to the meaning of the term 'duties of excise,' which found favour with the majority of the Supreme Court, and regarding the term as it is used in the Constitution, where it is limited to taxes imposed upon goods in process of manufacture, we find nothing in the State Act to show that this licence fee was other than a direct tax upon the manufacturer": *Peterswald v. Bartley*, (1904) 1 C.L.R., 497-

512. *Brewers' and Maltsters' Association of Ontario v. Attorney-General of Ontario*, (1897) A.C., 231 ; and *Bank of Toronto v. Lamb*, 12 App. Cas., 575, applied.

Exceptions as to bounties.

91. Nothing in this Constitution prohibits a State from granting any aid to or bounty on mining for gold, silver, or other metals, nor from granting, with the consent of both Houses of the Parliament of the Commonwealth expressed by resolution, any aid to or bounty on the production or export of goods.

Trade within the Commonwealth to be free.

92. On the imposition of uniform duties of customs, trade, commerce, and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free<sup>160</sup>.

But notwithstanding anything in this Constitution, goods imported before the imposition of uniform duties of customs into any State, or into any Colony which, whilst the goods remain therein, becomes a State, shall, on thence passing into another State within two years after the imposition of such duties, be liable to any duty chargeable on the importation of such goods into the Commonwealth, less any duty paid in respect of the goods on their importation.

#### Conspectus of Notes to Section 92.

##### § 160. "ABSOLUTELY FREE."

- Records of inter-state trade.
- Discriminating licences.
- Inter-state travel and intercourse.
- Intercourse—what it connotes.
- American cases on inter-state trade.
- American exceptions to rule of freedom.
- Fraud debars trade and commerce.
- No commerce in diseased commodities.
- Native game and plants—state property.
- Australian State laws affecting inter-state trade.

New South Wales.  
Victoria.  
South Australia.  
Queensland.  
Western Australia.  
Tasmania.  
Wheat Acquisition Act, N.S.W.  
Validity affirmed.  
Meat Supply Act, N.S.W.  
Validity denied—afterwards affirmed.  
Meat Supply Act, Queensland.  
Validity affirmed.  
Commonwealth objection to Wheat and Meat Acts  
State claim to acquire property in goods.  
State claim to annul contracts.  
State claim to limit power of sale.  
State power of expropriation.  
State power to localize and detain goods within certain bounds.  
State claim to dedicate and hold goods to public purposes.  
Goods held by state in *custodia legis*.  
State power over property within its territory.  
Goods *extra commercium*.  
Denial of right to sell.  
Meaning of inter-state freedom.  
Incapacity to dispose of goods—a denial of freedom.  
Immobility of goods by state order—a denial of freedom.  
The doctrine of dedication controverted.  
The right of free disposition claimed.  
“A decision of previous effect.”  
“Is inter-state freedom a sham?”  
Imperial interest a stalking horse.  
Property without power of sale.  
Derogation from inter-state freedom.  
Reserved powers of states.

### § 160. “ABSOLUTELY FREE.”

#### LEGISLATION.

##### Records of Inter-State Trade.

By the Customs Act 1901, section 273, it was provided that during the first five years after the imposition of uniform duties of Customs and thereafter until the Parliament otherwise provides the Customs shall in manner prescribed collect particulars of the duties of customs chargeable on goods imported into a State and afterwards passing into another State for consumption and the duties of excise paid on goods produced or manufactured in a State

and afterwards passing into another State for consumption and the same shall be furnished to the Treasurer of the Commonwealth so that the accounts between the States may be kept as required by the Constitution. The practice of keeping records of inter-state trade and transfer was abolished in 1910 by the repeal of section 273. The Customs (Inter-State Account) Act, sections 1 and 2.

### **Discriminating Licences.**

A law of a State which, for a licence authorizing the sale of wine manufactured from fruit grown in any other State, requires a greater fee to be paid than for a licence authorizing the sale of wine manufactured from fruit grown in the first mentioned State, is contrary to the provisions of section 92 of the Constitution, and is, therefore, to the extent at least of the difference between the fees so required to be paid, invalid: *Fox v. Robbins*, (1909) 8 C.L.R., 115.

In the Court of Petty Sessions, Perth, Western Australia. Samuel A. Fox, the appellant, charged that William M. Robbins, the respondent, not being the holder of a licence under the Wines, Beer and Spirit Sale Act 1880, authorizing the sale of wines not the product of fruit grown in the State of Western Australia, did sell liquor, to wit one glass of wine, not being the product of fruit grown in the State of Western Australia.

The Police Magistrate dismissed the case. A special case was stated which eventually came before the High Court. The wine sold was the product of fruit grown in the State of Victoria. The State Act of 1880 authorized the issue of several different licences for the sale of liquor, for which different fees are required to be paid. At the date of the prosecution the fee prescribed for a licence authorizing the sale of wine the product of fruit grown in Western Australia was £2, while the fee for the only licence under which wine made from fruit grown in any other part of Australia could be sold was £50.

The respondent submitted that, although discrimination between the conditions upon which wine the product of Western Australian fruit and wine the product of fruit grown in other States may be sold was permissible before the establishment of the Commonwealth, any such discrimination after that period was unlawful: and he relied on the provisions of section 92 of the Constitution. It was contended that section 39 of the Act of 1880 was invalid so

far as it makes it an offence to sell wine made from fruit grown in other States without having a licence for which the fee is £50.

The Chief Justice (Sir SAMUEL GRIFFITH) said :—" Section 92 of the Constitution would be illusory if a State could impose disabilities upon the sale of the products of other States which are not imposed upon the sale of home products. It follows, in my opinion, that a law which had that effect before the imposition of uniform duties could not remain in force after that imposition. The Supreme Court of the United States long ago laid down a similar rule under the American Constitution. That Constitution does not contain any express provision to the effect of section 92, but the Court rested their decision upon an implied prohibition which they found in the consideration that if such a law were held valid the object for which the power to control trade and commerce between the States was vested in Congress would be defeated." The Chief Justice referred to the case of *Welton v. The State of Missouri*, 91 U.S., at p. 282. He then proceeded :—" In my opinion a similar implied prohibition results from the express language of section 92, so that the Act of Western Australia now in question, in so far as it makes a discrimination against wine the product of fruit grown in other States of the Commonwealth in favour of wine the product of fruit grown in Western Australia, is contrary to the Constitution, which is the paramount law of the Commonwealth " : 8 C.L.R., at p. 119.

Mr. Justice BARTON :—" I have no doubt whatever that the State enactments now in question, valid as they were when passed, have become, if not ever since the imposition of uniform duties of customs of the Federal Parliament in 1901, then certainly since the expiration of the special tariff of Western Australia in 1906, inoperative so far as they derogate from the freedom of inter-state trade ordained by section 92 of the Constitution. That they so derogate is abundantly clear " : 8 C.L.R., at p. 122.

Mr. Justice O'CONNOR said :—" It is clear that the Constitution does not permit a State by such discriminating charges to place at a disadvantage the goods of other States passing into it for sale. It has long been a firmly established principle of the American Constitution that such discriminations are an obstruction to the right of free and unimpeded trade throughout the States, which it was one of the great objects of the American, as it has been of the



Australian Constitution to secure. In America the principle is held to rest on the exclusive powers of Congress over inter-state trade, and it is laid down that as Congress has refrained from enacting any law restricting inter-state trade, that must be taken as 'equivalent to a declaration that inter-state commerce shall be free and untrammelled'; *Welton v. State of Missouri*, 91 U.S., 275, at p. 282, *per FIELD, J.* In the Australian Constitution, passed, we must assume, with a knowledge of the American decisions, the principle is not left to assumption or deduction. It is plainly set forth in section 92:—'On the imposition of uniform duties of customs, trade commerce and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free.' There could hardly be a clearer instance of an infringement of the rights thus conferred on the people of each State of the Commonwealth in their dealings with each other than is to be found in the enactments under consideration": 8 C.L.R., at p. 126.

Mr. Justice ISAACS said:—"The Western Australian Act was valid when passed, and continued to be in all respects a binding enactment up to the date of the imposition of the Commonwealth customs duties. The provisions of section 92 of the Constitution now require from that date that trade, commerce, and intercourse among the States shall be absolutely free. That is an organic law—superior to any Act of any Parliament either Commonwealth or State. Section 5, one of the covering sections of the statute which enacts the Constitution, provides:—'This Act . . . shall be binding on the Courts, judges and people of every State and of every part of the Commonwealth, notwithstanding anything in the laws of any State.' Consequently, so far as the provisions of the Western Australian Wines, Beer and Spirit Sale Act would in their operation offend against the constitutional declaration of absolute freedom of inter-state trade, they are ineffective and void, and no longer to be regarded as law": 8 C.L.R., at p. 127.

Mr. Justice HIGGINS said:—"I entertain no doubt that the Wines, Beer and Spirit Act 1880 (as amended by 57 Vict. No. 25) offends against the Constitution, in so far as it allows a man to sell wine, the produce of fruit grown in Western Australia, under a licence costing only £2, leaving those who desire to sell wine produced from other fruit to take out a general publican's licence costing £50. This involves a discrimination in favour of Western Australian pro-

ducts, and an infringement of the provisions of section 92 of the Constitution in favour of absolute freedom of trade among the States (and see section 51, 91 U.S., 275, 112 and 117). The Constitution of the United States is not nearly so explicit as ours on this subject ; and yet the Courts have clearly laid down that such a discrimination is invalid : *Welton v. The State of Missouri*, 91 U.S., 275 ; *Tiernan v. Rinker*, 102 U.S., 123 ; *Scott v. McDonald*, 165 U.S., 58 : 8 C.L.R., at p. 131.

### Inter-State Travel and Intercourse.

Neither the fact of federation nor the strong words of the Constitution, section 92 destroys the right of individual States to take any precautionary measures to prevent the intrusion from outside a State of persons who may become dangerous to its domestic peace, order, health or morals. This is a branch of the police powers reserved to the States. The right of the States to exclude convicts, paupers, idiots, and lunatics has always been assumed : *Railroad Co. v. Husen*, 95 U.S., at p. 471.

The extent to which the power of exclusion is cut down and the line of demarcation which should be held to separate a justifiable from an unjustifiable exclusion may be hard to determine ; the Court will have to decide in controversies as they arise on which side of the line a case lies. So held *per* GRIFFITH, C.J. and BARTON, J. in *The King v. Smithers* ; *Ex parte Benson*, (1912) 16 C.L.R., 99.

The Influx of Criminals Prevention Act 1903 (N.S.W.) by section 3 provides that :—" If any person other than a person who has been resident in New South Wales (at or prior to the commencement of this Act), has before or after such commencement, been convicted in any other State . . . of an offence for which in such State he was liable to suffer death, or to be imprisoned for one year or longer ; and if before the lapse of three years after the termination of any imprisonment suffered by him in respect of any such offence, such person comes into New South Wales, he shall be guilty of an offence against this Act." John Benson, an inhabitant of Victoria, who had been convicted there in 1910 of being a person having insufficient lawful means of support, which offence may, by the law of Victoria, be punished by imprisonment for twelve months, having within three years after the termination of the imprisonment suffered by him in respect of such offence went into New South Wales, was convicted there of an offence against the section above

quoted. He was sentenced to 12 months' imprisonment. An order *nisi* for a writ of *certiorari* to remove into the High Court the record of the last mentioned conviction was obtained on behalf of Benson on the grounds—That the Influx of Criminals Prevention Act 1903 is *ultra vires* the Parliament of New South Wales, inasmuch as it is in contravention of section 92 of the Commonwealth of Australia Constitution Act.

It was held by the High Court that the conviction was bad : by GRIFFITH, C.J. and BARTON, J., on the ground that the power of the Parliament of a State to make laws for the exclusion of persons whom it thinks undesirable immigrants is limited to the making of laws for the promotion of public order, safety or morals, and that the exclusion of a person convicted of such an offence as that of which the accused was convicted in Victoria was not within the power as so limited ; by ISAACS, J. and HIGGINS, J., on the ground that the section of the New South Wales Act was an interference with freedom of "intercourse" between the States within the meaning of section 92 of the Constitution, and was therefore invalid.

"As to section 92, which is the only section" said Mr. Justice ISAACS, "I find it necessary to deal with, the applicant contends that the words 'intercourse' is unlimited, and refers to all transit of persons, and that the words 'absolutely free' are so large as not to be susceptible of reduction by exceptions. On the other hand, it is said for the respondent that section 92 must be read as subject to what is called the 'police power' of the State, or in other words, the right of the State to safeguard the health, morals and safety of its inhabitants. In my opinion, the guarantee of inter-state freedom of transit and access for persons and property under section 92 is absolute—that is, it is an absolute prohibition on the Commonwealth and States alike, to regard State borders as in themselves possible barriers to intercourse between Australians." *Per* ISAACS, J. in *The King v. Smithers ; Ex parte Benson*, 16 C.L.R., at p. 117.

"In my opinion," said Mr. Justice HIGGINS, "section 92 of the Constitution affords sufficient ground for the release of the prisoner : and it is unnecessary to consider the precise effect of section 117 of the Constitution. No due effect can be given to the word 'intercourse' unless it be treated as including all migration or movement of persons from one State to another—of children returning for their holidays, of friends visiting friends, as well as of commercial travellers

returning to their warehouse. I base my decision on the fact that the New South Wales Statute in this case (section 3) is pointed directly at the act of coming into New South Wales—makes the coming into New South Wales an offence on the part of the ex-criminal.” *Per HIGGINS, J.* at pp. 117 and 118.

### **Intercourse, What it Connotes.**

“ Moreover, what is the meaning of the provision that ‘intercourse’ among the States was to be absolutely free,’ if the intention was merely to forbid customs duties between the States? The use of the word ‘intercourse’ shows that more was meant. No doubt, ‘intercourse’ had been held in the United States to be included under ‘trade and commerce’ in the power for Congress to regulate trade and commerce; but, if something more was not meant by the word ‘intercourse’ in section 92 than by the words ‘trade and commerce’ why was ‘intercourse’ used in section 92 and not in section 51 (1.), which confers on our Federal Parliament the power to make laws with respect to trade and commerce among the States? It has been observed that in another section, section 117, a limited provision as to intercourse among the States came into force at the same time as the Constitution; whereas by section 92, on the date of the imposition of the uniform customs duties, “intercourse’ became ‘absolutely free.’ If this construction is right the effect is very substantial. For a commercial for a Melbourne firm who lives at Albury cannot be forbidden by a New South Wales Act to solicit customers in New South Wales; an Adelaide resident cannot be prevented by South Australian law from coming to Melbourne for the ‘Cup’; a school-boy cannot be prevented from returning to Brisbane for his vacation from a Sydney school.” *Per HIGGINS J.* in *Duncan v. The State of Queensland*, 22 C.L.R., at p. 636.

### **Area of Inter-State Free Trade.**

It is important to determine by some definite rule of law or construction at what point of space or time goods may be said to become engaged in inter-state commerce, and to be therefore withdrawn from the general mass of property in a State, subject to the exercise of its taxation powers. Two well-known cases decided by the Supreme Court of the United States have laid down what may be regarded as a convenient working rule.

In *Coe v. Errol*, 116 U.S., p. 517, the principle was thus stated by Mr. Justice Bradley, in giving the opinion of the Court :—" There must be a point of time when they (the goods) cease to be governed exclusively by the domestic law and begin to be governed and protected by the national law of commercial regulation. That moment seems to us to be a legitimate one for this purpose, in which they commence their final movement for transportation from the State of their origin to that of their destination. When the products of the farm or the forest are collected and brought in from the surrounding country to a town or station serving as an entrepot for that particular region, whether on a river or a line of railroad, such products are not yet exports nor are they in process of exportation, nor is exportation begun until they are committed to the common carrier for transportation out of the State to the State of their destination or have started on their ultimate passage to that State. Until then it is reasonable to regard them as not only within the State of their origin but as part of the general mass of property of that State, subject to its jurisdiction and liable to taxation there, if not taxed by reason of their being intended for exportation but taxed without any discrimination, in the usual way and manner in which such property is taxed in the State."

After citing the *Daniel Ball*, 10 Wall., 565, Mr. Justice BRADLEY proceeded :—" But this movement does not begin until the articles have been shipped or started for transportation from one State to the other. The carrying of them in carts or other vehicles or even floating them to the depot where the journey is to commence is no part of that journey. That is all preliminary work, performed for the purpose of putting the property in a state of preparation and readiness for transportation. Until actually launched on its way to another State, or committed to a common carrier for transportation to such State, its destination is not fixed and certain. It may be sold or otherwise disposed of within the State, and never put in course of transportation out of the State. Carrying it from the farm or the forest to the depot is only an interior movement of the property, entirely within the State, for the purpose, it is true, but only for the purpose, of putting it into a course of exportation ; it is no part of the exportation itself. Until shipped or started on its final journey out of the State in exportation is a matter altogether in *fieri*, and not at all a fixed and certain thing " : 116 U.S., at p. 517.

**American Cases on Inter-State Trade.**

There are numerous American decisions disallowing State restrictions on goods entering one State from another State even where a local production of such goods is forbidden by State law. There are also several cases which deny the right of a State to interfere with transportation of commodities from within it to a neighbouring State. Interference by a State with inter-state trade under whatever guise is held to be unconstitutional. The Statute dealing with trade must be judged not by its words only but by its effects and operations. In *Schollenberger v. Pennsylvania*, 171 U.S., 1, it was held that an article recognized in practice or by law as an article of food and commerce could not be wholly excluded, by the operation of a State law, from introduction commercially into that State from another State where it was manufactured. In that case the manufacture as well as the sale of the article (oleo-margarine) within the importing State was prohibited. Mr. Justice PECKHAM, who delivered the judgment of the Court, said :—" That the question whether the substance was an article of commerce must be determined by the Court with reference to those facts which are so well and universally known that Courts will take notice of them without particular proof being adduced in regard to them, and also be reference to those dealings of the commercial world which are of like notoriety " : 171 U.S., at p. 8.

In *Collins v. New Hampshire*, 171 U.S., 30, the importing State Statute simply prohibited the sale of the same article (oleo-margarine) as a substitute for another (butter) unless it were coloured pink. As this condition would make it unsaleable, the Act was held to be a prohibition of sale. In that case the article was not manufactured within the importing State at all. It is thus apparent that in each case the article the sale of which was forbidden was not found within the prohibiting States unless it were introduced from some other State. It was held in each case that the State Statute operated as a prohibition of inter-state trade in the article and was void. It was not seriously contended in either instance that the article would be injurious to the health of the people of the State if consumed therein. It is clear that in either case the transportation of such an article out of the State if produced within it could not have been prohibited or restricted without a violation of the Constitution. For the right of inter-state commerce is of course, reciprocal. Mr. Justice PECKHAM, in delivering judgment,

cited the case of *Railroad Co. v. Husen*, 95 U.S., 465, where the Supreme Court of the United States, while conceding the rights of the importing State to enact reasonable inspection laws to prevent the importation of diseased cattle, held the law of Missouri, then under consideration, to be invalid, because it prohibited absolutely the introduction of Texas cattle during the time named in the Act, even though they were perfectly healthy and sound. . . . The bad article may be prohibited but not the pure and healthy one. The Court held in *Collin's Case* that the State law was in its practical effect prohibitory : 171 U.S., at p. 33.

### Natural Gas Cases.

In *Ohio Oil Company v. Indiania*, 177 U.S., 190, the judgment mentions with approval that in *Corwin's Case*, a law of Indiana was held void by the Court of that State as an interference with inter-state commerce, because it, prohibited under a penalty the conduction of natural gas beyond the State.

In *Reid v. Colorado*, 187 U.S., at p. 151, the Court, in the course of its judgment, said that the defendant has a right under the Constitution to ship live stock from one State to another State. This will be conceded on all hands.

But the most important case of this kind was that of *Oklahoma v. Kansas Natural Gas Co.*, 221 U.S., 229, decided in 1911, where it was held that a Statute of Oklahoma which purported to confine the transmission of the natural gas of Oklahoma to points within that State, was a violation of the Constitution as an interference with the freedom of inter-state commerce. The Court held that natural gas became a subject of commerce, and therefore of inter-state commerce, when the owner of the soil had so far captured it as to conduct it in pipes. The State Attorney-General, who failed in the appeal argued that the ruling principle of the Statute was "conservation, and not commerce"; and he contended that a State has the right to conserve its natural resources. The Supreme Court in its judgment, delivered by McKENNA, J., 221 U.S., at pp. 254-255, said :—"The Oklahoma Statute . . . does not alone regulate the right of reduction to possession of the gas, but when the right is exercised, when the gas becomes property, takes from it the attributes of property, the right to dispose of it. . . . The Statute of Oklahoma recognizes it to be a subject of intra-state commerce, but seeks to prohibit it from being the subject of

inter-state commerce, and this is the purpose of its conservation. . . . If the States have such a power a singular situation might result. Pennsylvania might keep its coal, the north-west its timber, the mining States their minerals. And why may not the products of the fields be brought within the principle? . . . To what consequences does such power tend? If one State has it, all States have it; embargo may be retaliated by embargo, and commerce will be halted at State lines. And yet it is said that 'in matters of foreign and inter-state commerce there are no State lines.' . . . At this late day it is not necessary to cite cases to show that the right to engage in inter-State commerce is not the gift of a State, and that it cannot be regulated or restrained by a State. . . . The State, through this Statute, seeks in every way to accomplish these ends, and all the powers that a State is conceived to possess are exerted and all the limitations upon such powers are attempted to be circumvented": 221 U.S., at p. 260.

The *Oklahoma Case* was followed by *Haskell v. Kansas Natural Gas Co.*, 224 U.S., 217, which also held that natural gas after severance being a commodity which could be dealt in like other products of the earth, and which was therefore a legitimate subject of inter-state commerce, was not subject to any State legislation which could prohibit its being transported in inter-state commerce, and that the Act of Oklahoma was an unconstitutional interference with inter-state commerce as held in the previous case.

### **American Exceptions to Rule of Freedom.**

Apparent exceptions to the rule of inter-state free trade are to be found in some State regulations relating to the introduction of articles, including food products where the object of such regulations is to insure the purity of the article imported, such power, however, does not include the total exclusion of the article unless it be in itself dangerous or injurious to the health or morals of a community. Articles of commerce tainted with fraud, deception, adulteration, disease and danger may be prohibited from entering a State on the ground of public policy and on the ground that such State regulations come within the police powers of the State. There are numerous instances of the prohibition of the internal local trade or traffic of a State or in the production of articles which are deemed harmful to the people of the State.



**Fraud debars Trade and Commerce.**

In *The Plumley v. Massachusetts*, 155 U.S., 461, a prohibition was held not to be inconsistent with the rule of inter-state freedom, as it was based entirely upon the theory of the right of the State to prevent deception and fraud in the sale of any article. It was for the fraud and deception manifested in selling the article for what it was not, and in selling it so that it should appear to be another and a different article, that the right of the State was upheld. The question of the right totally to prohibit the introduction from another State of a pure article did not arise in that case and, of course, was not passed upon.

**No Commerce in Diseased Goods.**

In the *Licence Cases*, 5 How., at p. 576, TANEY, C.J. said :— It must be remembered that disease, pestilence, and pauperism are not subjects of commerce, although sometimes among its attendant evils. They are not things to be regulated and trafficked in but to be prevented, as far as human foresight or human means can guard against them.

**Native Game not Commerce.**

In the case of *Geer v. Connecticut*, 161 U.S., 519, it was decided that the State could prohibit the export of native game from the State, but in that case the game was at the outset held to be at common law the public or collective property of the State, and could therefore be retained for the State or be subjected at its will to laws imposing restrictive conditions as to sale and transport. That was the result of initial State ownership, and it would have been the result as to the cattle in the *Queensland Meat Case* if the State had acquired them by law before the prohibition complained of ; but it was not in the position of private property like the cattle of graziers so long as their ownership remained.

**Native Trees.**

A State Statute forbidding the exportation of cyprus trees was upheld although it affected inter-state commerce ; the mere fact that inter-state commerce is indirectly affected will not prevent the State from exercising its police powers, at least until Congress in the exercise of its supreme authority, regulates the subject : *Sleigh v. Kirkwood*, 237 U.S., 52.

**Exceptions to Inter-State Freedom.**

An Iowa Statute prohibiting the manufacture of intoxicating liquors was held to be valid although it certainly—as a necessary result—restricted inter-state traffic in such liquors: *Kidd v. Pearson*, 128 U.S., 1. In *Smith v. Alabama*, 124 U.S., 465, an Alabama Statute forbidding engine-drivers to work engines for passengers or freight without examination or licence was held to be valid even as to inter-State trains. A Georgia Statute making it unlawful to run any freight trains on Sundays within Georgia was held to be valid even as to inter-state trains until the Federal Congress should pass legislation inconsistent with the State Statute: *Hennington v. Georgia*, 163 U.S., 299.

**State Laws affecting Inter-State Trade.**

As the result of a poor harvest aggravated by the war conditions, beginning in August, 1914, creating transport difficulties throughout Australia and interfering with oversea trade, the State Governments and Parliaments of Australia felt the necessity of resorting to drastic legislation primarily intended for domestic purposes but which resulted in serious infringement of the fundamental principle of freedom of trade provided by the Constitution, section 92. It will be useful to present here brief summaries of the State laws referred to as an introduction to the important constitutional cases which afterwards came before the High Court for decision.

**New South Wales.**

The Necessary Commodities Control Act 1914, assented to 25th August 1914, provided for the appointment of a commission, whose duty was to report as to the maximum prices, having reasonable regard to market conditions for the State of New South Wales, to be charged for any necessary commodity, including articles of food. The Governor might then make a "declared price" as the "maximum price at which any necessary commodity may be sold for consumption in New South Wales." Penalties were provided for selling at a price higher than the declared price, and for refusing to sell at the declared price. Returns were to be made of all the necessary commodities in the State, and when such necessary commodities as should in the opinion of the commission be distributed for public use were being withheld from sale, they might be seized and distributed, the declared price being paid. This Act was to apply only during the continuance of the war, or for not more than six months afterwards if extended by proclamation.

On 15th September 1914, the price of wheat was fixed by the commission at 4s. 2d. ; on the 16th October 1914, the price of wheat was fixed at 4s. 6d. per bushel for the sea-board counties of Cumberland and Northumberland.

### Victoria.

The Victorian legislation began with an Act known as the Price of Goods Act 1914, assented to 9th September 1914. This was an Act to make provision against undue restriction of the supply of goods or undue raising of the prices of goods in time of war. By this Act a Prices Board was appointed to report as to the highest selling prices for any goods (a term which included goods used by man for food) and the prices so specified might be gazetted and were to be the declared prices. There was no attempted limitation in the Act as there was in the New South Wales Statute to sales "for home consumption." The Act provided penalties for selling at higher than the declared price, or refusing to sell except at such higher prices. On the 10th December 1914, the Foodstuffs and Commodities Act 1914, was passed ; this was an Act relating to the distribution, export, and prices of foodstuffs and other commodities and to compel the supplying of information in relation thereto. The Board to be appointed under the Act first mentioned was to report upon the distribution, export and prices of foodstuffs and upon the quantity and distribution thereof, the probable requirements of the people of Victoria in regard thereto, any attempt by any person to engage in speculative dealings in or to raise the prices of foodstuffs and other commodities. So far as executive action was concerned, the Government of Victoria, being informed that wheat was being trucked from that State to the Government of South Australia, directed the railway commissioners to stop such transport.

Returns were to be supplied by all persons possessing or controlling quantities greater than a specified amount, and penalties were provided to enforce the furnishing of such returns. The only compulsion exercised by the Act was with regard to supplying information. By a later Act (No. 2572) this Act was continued until the 30th April 1915. On the 20th September 1914, the price of wheat in Victoria was fixed at 4s. 9d. On the 17th November 1914, the price of wheat was fixed at 5s. 6d. On the 3rd December 1914, an Order in Council was gazetted reciting a report of the Board

that in their opinion "No good object could be obtained by interfering longer with the free course of trade in connection with these goods," and the Order in Council rescinded all notifications of price as to wheat.

### **South Australia.**

In South Australia on the 13th August 1914, there was passed the Prices Regulation Act 1914. This was an Act to make provision for temporarily controlling and regulating the prices chargeable for the necessaries of life and for other purposes. The preamble declared that it was "expedient, in view of the state of war at the present time existing in Europe, to provide against unreasonable increases in the prices of commodities which are regarded as necessities of life, and to prevent the withholding of supplies of such commodities by persons in possession thereof." A Commission consisting of a Supreme Court Judge and two other members was appointed, which was empowered to "declare the maximum price at which the necessary of life should be sold." A penalty was provided for failing to supply any such necessary of life and for forfeiture of all goods refused, on a certificate by the Commission. Goods so forfeited and goods reasonably believed to be forfeited might be seized by the police; when so seized they could be sold or otherwise disposed of, as the Minister should direct, and the owner was entitled to be paid a fixed price after certain deductions. Power was taken in this Act to search wherever any necessary of life or forfeited goods "are, or are supposed to be." In South Australia, a shipment of wheat destined for Tasmania was seized by order of the Government.

In the above Statute there was no attempted limitation as to prices "for home consumption." The Commission on the 23rd September reported that "except in a few special instances in which increases in price might fairly be attributed to economic causes, prices in general had already fallen to the ante-bellum level." "This satisfactory position," they said, "was, no doubt, largely due to the deterrent effect of the legislation," just mentioned.

On the 24th September 1914, the Foodstuffs Commission Act was passed, similar to that of the Foodstuffs and Commodities Act of Victoria. It was to cease on the conclusion of the war. It

reproduced the provisions of the Victorian Act last mentioned, and added a provision for forfeiture to the Crown in case of failure to make a return or of making a false return.

On the 12th November 1914, the Grain and Fodder Act 1914 was passed. This was an Act to make provision for insuring and distributing supplies of grain and fodder, and for purposes incident thereto and consequent thereon. The preamble states that it was "expedient in view of the drought now prevailing in the State of South Australia to make extraordinary provisions for insuring that there will be sufficient supplies of grain and fodder available for the use of persons requiring the same." A Board, called the Grain and Fodder Board, was to be constituted. This Board was empowered to acquire all or any quantity of any grains or fodder now or thereafter within that State, a power which was not to be exercisable after the 30th September 1915. This power of acquisition might be exercised in three ways, first by purchase, second by taking possession with or without the consent of the owner, third by notice of intention to acquire. Howsoever exercised, the result was to be that the grain and fodder "shall vest absolutely in the Board, and shall, subject to any dispositions thereof made by the Board under this Act, be and remain the property of the Board for the purposes of the Act." Acquisition by the Board was to discharge any obligation to deliver to any other person. Under this Act the Government acquired, by notice, 300,000 bushels of wheat from farmers. In its main features, this Act was precursor of the New South Wales Wheat Acquisition Act.

#### **Queensland.**

In Queensland, on the 12th August 1914, an Act was passed to secure supplies of meat for the use of the Forces of His Majesty's Imperial Government during the war, and for other purposes. By this Act, which is to remain in force for such period as is fixed by proclamation, all stock and meat "intended for export" in any place in Queensland are to be held at the disposal of His Majesty's Imperial Government, in aid of the supplies of His Majesty's Army in the present war. This Act at once impounded, so to speak, all the stock and meat in question which was thenceforth declared "to be held and kept for supplies to His Majesty's Armies in the field."

Upon an order in writing being made by the Chief Secretary all stock and meat mentioned in the order "shall cease to be the

property of the then owners, and become the absolute property of His Majesty, the title and property thereto being changed into the right to receive payment therefor." Any State officer may seize such stock or meat, and all persons are prohibited from selling, shipping, exporting, and delivering, or in any manner dealing with any stock of meat whether actually appropriated or not.

This Act also, in its main exercise of power was a forerunner of the New South Wales Wheat Acquisition Act, and, under it, all stock and meat have been declared by order to be His Majesty's property.

The operation of the Act may be extended by proclamation to cover all foodstuffs, commodities, goods, chattels, live stock, or things whereupon the provisions of the Act apply to the goods mentioned in the proclamation.

On the 26th August 1914, the Control of Trade Act of 1914 was passed to make provision against undue restriction of the supply of goods or undue raising of the prices of goods during the war. Foodstuffs and other commodities may, by proclamation, be made, subject to the Act.

Boards of control were to be constituted, and maximum prices may be declared for any goods under the Act. Selling at higher prices than the declared price is an offence. The principal articles of food have been brought under the Act, and maximum prices fixed for them. With the exception of orders relating to the price of meat, they were all rescinded by proclamation of the 7th December 1914. Bread was brought under the Act on the 18th January 1915.

### **Western Australia.**

An Act intituled "The Control of Trade in War Time Act" was assented to on the 8th August 1914. The object of this Act was to regulate the sale of the necessaries of life during war time, and to provide that it should have operation only during a state of war existing between the United Kingdom and some other power. The Act provided for the appointment of a Royal Commission, upon the advice of which the Governor was authorized by Order in Council to fix the maximum prices that may be lawfully charged for the necessaries of life, and such products, goods, chattels, and things as may be declared to be necessaries of life. The Act contains power to seize for offences against the Act, power to enter ; corners

and restrictions were prohibited, also the export of the necessities of life to a place beyond the limits of the Commonwealth without the consent, in writing, of the Control Treasurer.

On the 22nd January 1915, an Act to make provision for insuring and distributing supplies of grain and foodstuffs (the short title of which is the Grain and Foodstuffs Act 1914) was assented to. By this Act a Board, to be called "The Grain and Foodstuffs Board," was constituted. The Board was empowered to secure grain and foodstuffs now or hereafter within the State, except grain hereafter imported into the State. The acquisition, the fixing of prices, and the vesting in the Board and of the discharge of contractual obligations are identical with provisions of the Grain and Fodder Act 1914, of South Australia. The Board announced its intention to acquire all non-imported grain in Western Australia, fixing the price of wheat at Perth at 7s. 4d. per bushel. In Western Australia the Government detained wheat destined for South Australia.

#### **Tasmania.**

In Tasmania, a Bill was passed by the Legislative Assembly similar to the Necessary Commodities Act of New South Wales. but was rejected by the Council. It proposed penalties against buying up or storing up of necessities of life with intent to raise prices or prevent free circulation.

#### **New South Wales.**

On the 11th December 1914, the Parliament of New South Wales passed an Act to enable the Government to compulsorily acquire wheat in New South Wales ; to provide for compensation for wheat so acquired, and for its sale and distribution ; to provide for varying of or cancelling certain contracts for the sale and delivery of wheat.

The Governor, by notification published in the *Gazette*, may declare that any wheat therein described or referred to is acquired by His Majesty.

Upon such publication the wheat shall become the absolute property of His Majesty, freed from all mortgages, charges, liens, pledges, interests, and trusts affecting the same, and the rights and interests of every person in the wheat at the date of such publication shall be taken to be converted into a claim for compensation in pursuance of the provisions of this Act.

The compensation to be paid for any wheat acquired by the Government under this Act shall be 5/- per bushel for wheat of fair average quality delivered by the owner or person having the disposal of the wheat at the nearest railway station or at a place determined by the person authorized as aforesaid by the Minister : Provided that such place shall not be more than one mile further than such railway station from the place from which the wheat is to be carried.

Notwithstanding anything hereinbefore provided, there shall be paid as additional compensation such further amount per bushel of the wheat so acquired as the Commissioners appointed under the Necessary Commodities Control Act 1914, determine to be reasonable.

The Board shall, on behalf of the Government, sell or dispose of any wheat acquired under this Act at such times, at such prices, and on such terms of payment as may be thought fit.

The net proceeds of any such sale shall be paid into the Treasury, and carried to a special account. The moneys at credit of such account shall be used to recoup the Consolidated Revenue Account for moneys paid out of such account under this Act.

Every contract made in the State of New South Wales prior to the passing of this Act, so far as it related to the sale of New South Wales 1914-1915 wheat to be delivered in the said State is hereby declared to be and to have been void and of no effect so far as such contract has not been completed by delivery.

Any transaction or contract with respect to any wheat which is the subject matter of any contract or part of a contract which is hereby declared to be void shall also be void and of no effect, and any money paid in respect of any contract hereby made void or of any such transaction shall be repaid.

Every contract for the sale of flour made in New South Wales prior to the passing of this Act, so far as it relates to the sale to be delivered after the first day of January one thousand nine hundred and fifteen, is hereby declared to be and to have been void and of no effect.

By the Meat Supply for Imperial Uses Act (N.S.W.) 1915, section 5, it was declared :—" (1) That all stock and meat,



meaning thereby cattle, sheep and pigs, in any place in New South Wales are and have become and shall remain subject to this Act and shall be held for the purposes of and shall be kept for the disposal of His Majesty's Imperial Government in aid of the supplies for His Majesty's Armies in the present war. (2) Forthwith upon the making of an order in writing under the hands of a Minister . . . all stock and meat mentioned in such order shall cease to be the property of the then owner or owners thereof, and shall become and remain the absolute property of His Majesty, freed from any mortgage, charge, lien, or other encumbrance whatsoever . . . and all the title and property of the then owners thereof shall be changed into a right to receive payment of the value thereof in the manner and to the extent provided by this Act."

#### **New South Wales Wheat Acquisition Act.**

In January 1915, action was taken to test the validity of the New South Wales Wheat Acquisition Act; proceedings were instituted by the Commonwealth against the State of New South Wales and its Inspector-General of Police before the Inter-State Commission for contravention of the provisions of the Constitution relating to trade and commerce between the States in regard to three parcels of wheat. The plaintiff asked for an order commanding the defendants to cease from the alleged violations of the law.

The complaint before the Inter-State Commission alleged three specific acts of seizure of wheat in violation of the Constitution. On 5th December 1914, T. J. Gorman, a resident of New South Wales, sold wheat then in New South Wales to Arnott & Doyle of Yarrawonga, in Victoria, to be delivered at Yarrawonga. Some of this wheat had been delivered on the 18th December 1914, and while a further portion of the wheat was being carried from New South Wales to Victoria in pursuance of the contract, the defendants seized it and prevented it from being delivered at Yarrawonga.

On the 5th December 1914, E. J. Gorman, a resident of New South Wales, sold wheat then in New South Wales to J. F. Goulding, of Melbourne, to be delivered on railway trucks at Yarrawonga or Cobram, both in Victoria. Part of this wheat had been delivered on the 18th December 1914, and the defendants prevented E. J. Gorman from carrying the balance of the said wheat to Victoria.

On and before the 18th December 1914, Sheppard, Harvey & Co. sold wheat then in New South Wales on account of a number of

farmers in New South Wales to Kimpton & Sons, of Melbourne. On the 19th December, part of the said wheat was lying at railway stations in New South Wales, waiting to be loaded on trucks. The plaintiff further alleged that such wheat was in course of transit from New South Wales to Melbourne in pursuance of the sale, and that the defendants seized the wheat and prevented it from being carried to and delivered at Melbourne.

The answer of the defendants was that with regard to all the parcels of wheat, they were, when taken possession of by the defendants, the property of His Majesty, by virtue of the Wheat Acquisition Act of 1914, and a notification of the 18th December in pursuance of that Act. The case was exhaustively argued in Melbourne at special sittings of the Commission, extending over twelve days. Written judgments were afterwards delivered by each of the Commissioners.

Chief Commissioner PIDDINGTON, K.C., reviewed the whole of the constitutional law, relating to inter-state freedom of trade and he summed up his conclusions as follows :—" The immediate question being the validity of an Act appropriating, under necessity, a definite volume of wheat for food and seed for the general welfare, I conclude that the Statute in question is valid for the following reasons :— That the power, in case of necessity, of acquiring food for the civilian population and seed for future cultivation by the expropriation of private ownership, is an essential power of self-government, springing from a fundamental law of society. Before Federation that power was vested in the States ; this power is not vested in the Commonwealth Parliament ; neither is it withdrawn from the Parliaments of the States, because it is a power relating to the tenure of property and not to commerce. It follows, therefore, that its exercise by the defendant State in the present Act was a valid exercise of power, and that the wheat taken into control of the defendant Government was, at the time of taking, the property of His Majesty. In my opinion the complaint should be dismissed."

The Chief Commissioner held that the Constitution, section 92, contained no latent rider that " property engaged in inter-state commerce shall be free from acquisition by the Commonwealth for Commonwealth purposes or by a State for State purposes." The plaintiff's argument admits a formidable deficiency in the legislative power of the Commonwealth and of the States.

"It is argued," he said, "that the New South Wales Act is an innovation of Commonwealth rights, but not because the power exercised belongs exclusively to the Commonwealth. The real ground is far wider. It is no less than this—that no Legislature in Australia has the right to pass such an Act at all. That is the feature of the present case which makes it so grave and far-reaching. It would be one thing to say that, under the Australian Constitution, what has been done could only be done by the Commonwealth Parliament. It is quite a different thing to say that it cannot be done at all, being, as it is, a matter affecting the internal affairs of New South Wales, and, on the face of it, regulating self-preservation and the promotion of agriculture, which are part of the ordinary duty of Government in all civilized countries."

#### **Eminent Domain.**

"On behalf of the Commonwealth, it was next objected that the Act contemplating, as it clearly did, the acquisition of all or any of the wheat in New South Wales, then, if such a Statute were upheld, no limit could ever be placed upon the acquisition by a State of any of the personal property of its citizens under the pretext of public use. The reasoning which looks exact is really neither exact nor practical."

"The power is a power to be exercised only in case of necessity which is exceptional in respect of personal property, and it is only in exceptional circumstances that the community (every member of which is interested in his own private property) would ever consent to its exercise. But the life of a country does not consist of a series of exceptional emergencies, nor is any practical prophecy possible from such abnormal times and events as the present to the course of a community's life in ordinary times. It might with equal reason be argued that, because the Commonwealth can compulsorily acquire supplies of clothing for the defence forces from manufacturers, it can expropriate all clothing and leave a (literally) naked community."

"It has, of course, been laid down that where a constitutional power exists, the question of any abuse of it is one for the electors and not for the Courts. Thus, for example, in the case of the *Attorney-General for Ontario v. The Attorney-General for Canada*. (1912) A.C., 584, Lord LOREBURN says at p. 584:—"It certainly would not be sufficient to say that the exercise of the power might be oppressive because that result might ensue from the abuse of

a great number of powers indispensable to self-government, and obviously bestowed by the British North America Act. Indeed, it might ensue from the breach of almost any power.' "

" Finally, it was contended by the Commonwealth that if the power claimed by the defendant State was held to exist, the State Legislature might expropriate all property in the State, and in that way deprive the rest of the Commonwealth of access to the resources of the State : *West v. The Kansas Natural Gas Company*, 221 U.S., at p. 229.

" The suggested maleficent conduct of the States is open to them now in other ways if ever the people of a State forsake the energetic exploitation of their resources, and in some access of economic mania seek to confine these resources to their own citizens as a matter, not of necessity in a grave emergency, but of policy in all circumstances.

" If the State of New South Wales, instead of resuming wheat at a fixed price, far above the average price for the last ten years, had purchased it, as they might have done, at an exorbitant price, all export of wheat from New South Wales would have ceased, and " access to the resources " of New South Wales in wheat equally been denied. And one frequently stated reason for the necessity of exercising eminent domain is that a Government should not be at the mercy of private owners as to the price it must pay.

" The one inflexible guarantee of the exchange of natural products is not the system of individual trading, but the human motive of self-preservation and self-advancement operative on the mind of a State as it is operative on the minds of the individuals of whom the State is composed.

" When the State has resolved to secure food for the people for whom it is its duty to provide, and to secure the cultivation of its lands, there is no law of the Constitution which requires it to leave its existing resources to the operations of private traders, inter-state or intra-state, or which forbids it to buy what it needs because that amounts to an embargo upon other States. None of the doctrine advanced to the contrary by the plaintiff is necessary to the constitutional requirement of absolute freedom of inter-State trade.

“The three requirements of commerce in being are first, products which are ‘sound articles of commerce’ in the American phrase, *i.e.*, products of which the State of the seller has not, in the proper exercise of its police power, forbidden the production and sale within the State; second, a willing seller; third, a continuing title to property in the product dealt with till the commerce is carried through. All these are matters of the law of property, not of the law of commerce. Section 92 does not, in my opinion, prescribe any new doctrine of property with regard to any of these conditions. The States have the power to regulate the carrying on of any business or trades within their boundaries, or, even if they think fit, to prohibit them altogether (*per* GRIFFITH, C.J., in *Peterswald v. Bartley*, 1 C.L.R., at p. 507) (compare *United States v. Knight*, 156 U.S., 1), and it is not bound to permit production because the goods will be wanted for inter-state commerce; a seller is not bound to sell because an inter-state buyer wants to buy; and, thirdly, an owner desiring to sell inter-state, in Mr. Justice HOLMES’ words, ‘cannot enlarge his otherwise limited and qualified right’ which is to sell unless the State expropriates. The meaning of section 92 is its plain and natural meaning, and that is that where these three conditions precedent exist, as they ordinarily do, neither Commonwealth or State can, by the exercise of any regulative power, burden or prevent the inter-state commerce which arises from their existence”: *Per* PIDDINGTON, K.C., *Official Rep.*, at pp. 56-64.

Commissioner SWINBURNE stated his conclusions as follows:—  
“Dealing with the Act as a whole I cannot but come to the conclusion, that, on the face of the Act, in its substance and in its incidence when put into operation, it clearly provides for a Government control of the whole production of New South Wales 1914-1915 wheat; by such legislative and executive action, private dealings in wheat and contracts for inter-state deliveries have, in fact, been restrained, arrested and annulled; that it is an exercise of the right to acquire private property which interferes with the express declaration of section 92 of the Constitution; that it is a further interference with powers vested in the Commonwealth, in which the exportation of wheat and flour having been prohibited from the Commonwealth, except to the British Dominions, the State of New South Wales endeavours to further control its own output, whereas such an act as prohibiting the export of wheat from the Commonwealth implies that the 1914-1915 wheat in Australia should be for

the benefit of the whole of the people of the Commonwealth ; and the action of the State of New South Wales may lead to the undue raising of the price of wheat in the other States as compared with New South Wales."

"The exercise of eminent domain in section 3 of the Wheat Acquisition Act can be made to operate from the State of New South Wales alone in the same way as a prohibition to export from the Commonwealth, exercised under the authority of the Constitution, operates for the whole of the States. On this ground also, as all powers of customs and excise and control of trade among the States and with foreign countries are vested in the Commonwealth, and as no State can legislate to do anything indirectly which it cannot do directly, the Act would appear to be an encroachment on the Constitution."

"I have, therefore, come to the conclusion that section 3 of the Wheat Acquisition Act is invalid, and, not being severable from the remainder of the Act, renders the whole Act invalid. If it were not invalid, a method has been discovered whereby a State owning the whole railway system, and possessing the power of eminent domain, can nullify the great commercial section of the Commonwealth Constitution, or make the same of no effect."

"I am of the opinion that the wheat of T. J. Gorman and E. T. Gorman, the subjects of two of the complaints, was not in transit on the date of the Proclamation of the 18th December, but was the subject of inter-state contracts and commerce ; and that it was seized and delivery restrained under proclamations issued under powers assumed in the Wheat Acquisition Act, No. 27 of 1914, which is invalid, and, therefore, the seizure and restraining of deliveries by the Government were an infringement of the powers vested in the Commonwealth Constitution. I consider that the defendants and each of them should be restrained from continuing the contravention of the Commonwealth Constitution as set out in the petition." *Per* SWINBURNE, C., *Official Rep.*, at pp. 68-85.

Commissioner LOCKYER said :—"If the main contention on behalf of the defendants is correct, it would, I think, be difficult to ascertain what purpose of benefit has been attained by the agreement of the States 'to unite in one indissoluble Commonwealth,' or what meaning may be attached to the declaration expressed in section 92 of our Constitution, that "on the imposition of uniform

duties of customs, trade, commerce, and intercourse among the States, whether by means of internal carriage or ocean navigation shall be absolutely free."

"It was argued that the limitation of the powers of the States by the provisions of section 92 was merely a denial of the right of the States to impose either directly or indirectly, burdens similar to Customs Tariffs.

"If these arguments may be supported by authority, and any and every State possesses the power to acquire absolutely any or every commodity ordinarily the subject of inter-State trade, to fix the price at which it may purchase, and the price at which the commodity must be sold, it necessarily follows that the States retain a power which entitles them to erect barriers on their frontiers much more effective, and far more impassable, than the tariff walls prior to Federation.

"Taking a plain practical view of the position, the exercise of powers of this character on the part of the States, suggests a selfish and conflicting division of interests, rather than the one general welfare, restriction rather than freedom of commerce, and a Federation strangely foreign to that of our common ideals.

"I am unable to find that the defence has succeeded in showing that any of the American cases cited disclosed any authority by which the sovereign rights of the Commonwealth in regard to the freedom of inter-state commerce, might be set aside by the exercise of any sovereign power on the part of a State.

"I am unable to come to any conclusion other than that the Wheat Acquisition Act 1914 directly places a burden and restraint on the freedom of inter-state trade, that it is in conflict with section 51 (1.) and section 92 of the Commonwealth Constitution, and therefore is invalid and of no effect. I am also of opinion there has been an interference by the defendants with the freedom of inter-state trade in the wheat, the subject at issue, and that they should be restrained from further continuing such interference": *Official Rep.*, at p. 87.

In accordance with the decision of the majority of the Commission an injunction was granted in terms of the prayer of the complaint. Order to lie in the office for one month to permit of appeal to the High Court.

**New South Wales Wheat Act.**

When the case came before the High Court on appeal (1915) 20 C.L.R., 54, the decision of the majority of the Inter-State Commission was declared to be null and void on the ground that the Commission was not invested with judicial power. See Notes to section 101. *The State of New South Wales and Inspector of Police v. The Commonwealth* (1915) 20 C.L.R., 54.

Although this decision would have disposed of the appeal, it would have left the validity of the Wheat Acquisition Act undecided. But during the hearing of the case on appeal a fresh suit had been, at the suggestion of the High Court, instituted by the Commonwealth against the State of New South Wales and the Inspector-General of Police for New South Wales, by a writ claiming a declaration that the Wheat Acquisition Act 1914 was beyond the powers of the Legislature of New South Wales, and seeking an order to restrain the defendants from infringing the provisions of section 92 of the Constitution or from taking steps to enforce the provisions of the Wheat Acquisition Act 1914. It was agreed that this suit should be tried on the facts stated in the special case. It was held by the whole Court that none of the provisions of the Wheat Acquisition Act violated section 92 of the Constitution which declares "that trade, commerce, and intercourse among the States shall be absolutely free," and therefore the Wheat Acquisition Act 1914 was valid.

**Commonwealth Objections.**

The argument of the Commonwealth was that the words of the Wheat Acquisition Act authorized the State of New South Wales to acquire the whole of the wheat in the State, and were intended to be (as they have in fact been) used for that purpose; that such an acquisition would have the necessary result of preventing the performance of any existing contracts for the sale of wheat in New South Wales to be exported to another State, and that such a result was a contravention of section 92 "that trade, commerce and intercourse among the States shall be absolutely free."

**State Power of Acquiring Private Property.**

"This argument, if valid," said the Chief Justice (Sir SAMUEL GRIFFITH) "would, in effect, invalidate any State law couched in general terms for the expropriation of personal property, unless it contained an exception of any such property which might at the



time of the attempted exercise of the power be the subject matter of inter-state commerce. In my judgment the well-known case of *Macleod v. Attorney-General for New South Wales*, (1891) A.C., 455, affords a complete answer to this argument. The general power of expropriation is a power which is by the Constitution neither withdrawn from the States nor exclusively vested in the Commonwealth. Therefore, by virtue of section 107 of the Constitution, it continues as at the establishment of the Commonwealth. When a State law is enacted in general terms, I do not think that it can be held invalid merely because its language is wide enough to cover cases with which by reason of some provisions of the Constitution it is beyond the competence of Parliament to deal. In such a case I think that, as a matter of construction, the Act should be construed as applying only to matters within the competence of Parliament, just as in the case of a Statute which in its terms includes matters beyond the territorial jurisdiction of the State, unless it appears on the face of the Act that it was intended to deal with matters beyond, as well as with matters within, the competence of Parliament, and that the provision dealing with both are not severable. It follows that in such a case the Statute should be construed as limited in its operations, not that it is invalid altogether. The term 'commerce,' assumes the existence of persons willing to engage in it, and who are the owners of property which is to be the subject of it."

#### **Title to Property.**

"The title to property is governed by State law, and, in general, the right of the owner to dispose of his property is also governed by State law. The right to control such dispositions is limited by section 92 of the Constitution. But that section has nothing to say to the question of title. The duration of the power of disposition, which depends upon title, is co-extensive with the duration of the title itself and ceases with it. There cannot, therefore, be any conflict between the law of title and the law of disposition, and a law which deprives a man of the ownership of property does not interfere with his power of disposition while owner."

The Chief Justice continued :—"Section 92, may therefore, so far as it relates to commerce, be paraphrased, thus :—Every owner of goods shall be at liberty to make such contracts for the transportation of goods from one State to another as he thinks fit without the interference by law. It follows that as soon as he ceases to be the owner of goods the section ceases to have any operation so

far as those goods are concerned. When the wheat in New South Wales became the property of His Majesty, the Sovereign, as the new owner, had the exclusive right of disposing of it. If the Government desired to export it to another State they were free to do so. Whether they did or did not, their power of disposition was not interfered with." *Per GRIFFITH, C.J.*, 20 C.L.R., at pp. 67-68.

### **Annuling Contracts.**

The Wheat Acquisition Act was attacked in two ways. In the first place, it was argued that sections 8 and 9 were direct attempts to annul contracts, which, on the true and ample interpretation of the language of those sections, include contracts which form an inseparable part of inter-state commerce. Many American cases were cited to show that a contract by which a vendor in one State contracted with his purchaser to deliver to a carrier in that State for transport to another State, was itself a contract of an inter-state character, and came within the definition of trade and commerce among the States. Perhaps the strongest case in support of that position is *Steward v. Michigan*, 232 U.S., 665, where it was held following a prior decision, that the negotiation of sales of goods which are in another State for the purposes of introducing them into the State in which the negotiation is made is inter-state commerce.

In dealing with the Wheat Acquisition Act, section 8, the Chief Justice said:—"It is contended that this section offends against section 92 of the Constitution by attempting to cancel contracts relating to the sale of wheat for exportation to another State, as, for instance, a contract to deliver wheat on board a ship or railway truck or to a carrier in New South Wales for transportation to another State. The provision is in its terms, limited to contracts for the sale of wheat to be delivered in New South Wales. As a matter of construction, I think that the contracts meant are contracts under the terms of which the obligations of the vendor so far as regards delivery are to be completed by transfer of possession from him to the purchaser in New South Wales. The section does not, therefore, operate to affect the validity of contracts the subject matter of which has come into the possession of the purchaser. If that purchaser desired to dispose of the wheat by exportation he could do so as long as it was his, but after it became the property of His Majesty, his wish became irrelevant, and his power ended. It is quite immaterial whether at the moment of acquisition

by His Majesty the property in the wheat contracted to be sold had or had not passed to the purchaser. In either case the ownership, and with it the power of disposition, came to an end. Section 8 has no application for a contract for the sale of wheat to be delivered in another State. In such a case, if the wheat had been transported to the other State, the Act would not affect it. If it had not, the Act deprived the owner of his ownership on which his power of disposition depended. I am, therefore, unable to see any ground for holding that this section offends against the provisions of section 92 of the Constitution": 20 C.L.R., at pp. 68-69.

### The Power of Sale.

Citing *Steward v. Michigan*, 232 U.S., 665, and *Brown v. Maryland*, 12 Wheat., 419, Mr. Justice ISAACS said:—"It had long been held that sale is an essential part of commerce intercourse. I see no reason, as at present advised, to deny that. Indeed, if it be not true I could well understand an argument against the validity of the Australian anti-trust legislation. But assuming so much. for the present purpose, the question remains whether sections 8 and 9 of the New South Wales Act do interfere with an inter-state transaction or whether they are not, on a proper construction to be confined to a purely intra-state transaction complete in itself as though perhaps intended to be followed by a further transaction itself of an inter-state character, yet is preserved in complete legal independence from the new transaction."

"Reading section 8 first with this guide" continued His Honor "it is clear from the deliberate limitation of the avoidance of contracts to the case where the wheat was 'to be delivered in the said State,' and from the concluding words of the first sub-section, that the State Parliament was endeavouring to keep within its limits. This is a guide to sub-section 2 of section 8 and also to section 9. The word 'delivered' in sub-section 1 of the latter section must have the same meaning as in section 8 and being *in pari materia* should be read with it, and this is aided by the reference to the 'purchaser' in the second paragraph of section 9. which assumes the purchaser is a person subject to the local law. I therefore read sections 8 and 9 as limited to purely New South Wales transactions, made and to be completely performed there. Then as to section 3. If that section stood alone I should, if section 92 forbids the taking of wheat covered by an inter-state contract. be prepared to read section 3 by the light of the presumption of

validity referred to, and to limit it to wheat not so covered. But having regard to the difference of language between section 3 and sections 8 and 9, I conclude the Legislature meant to cover all wheat in New South Wales thinking there was a difference between trade and commerce, and the subject of trade and commerce; just as there is a difference between railway travelling and the persons who travel."

### **The Power of Expropriation.**

"Now, in my opinion," said His Honor, "it was competent that a State Parliament to take all the wheat in New South Wales notwithstanding the fact that some of it was, as we may assume, already the subject of sale to purchasers in other States. Therefore, when a State deals with property on the basis of property and regulates its ownership irrespective of any element of inter-state trade, there is no abridgment of absolute freedom of trade."

"When the State without reference to inter-state contracts as a criterion or as influencing the operation of its enactment, proceeds to acquire wheat to feed its citizens, it merely changes ownership. It does not assume to govern the duties of the contracting parties to each other, or regulate in any way the interchange of goods belonging to the vendor." *Per ISAACS, J.*, 20 C.L.R., at pp. 97-100.

### **State Power to Acquire.**

Mr. Justice GAVAN DUFFY said :—"It is enough for the present case to say that section 3 of the Wheat Acquisition Act does not so offend against section 92 of the Constitution. It does no more than empower the King to acquire any or all of the wheat in New South Wales, and makes no distinction between grain the subject-matter of inter-state trade and other grain. It enables a change of ownership to be effected at the will of the Crown, and leaves the new owner free to act as he pleases. Wheat not acquired by the King is not touched by the Act; wheat acquired by the King may be dealt with by the Board and by purchasers of the Board without any restriction, and trade and commerce so far as it affects the wheat in their hands remains 'absolutely free.'"

Mr. Justice POWERS said :—"I also agree that the State of New South Wales had power to acquire any property in the State, and after acquisition to exercise the right of an owner to decide whether its property is to remain in the State or to be a subject of

inter-state commerce. Section 92 of the Constitution does not affect that right. Sections 3, 8 and 9 of the New South Wales Act can reasonably be, and ought, if possible to be, construed as referring only to matters within the jurisdiction of the State Parliament. I agree that the New South Wales Act in question is valid, and that the Commonwealth action fails."

Mr. Justice RICH said:—"I agree with the judgment of the Court and adopt what has been said by GAVAN DUFFY, J.," 20 C.L.R., at p. 111.

*The State of New South Wales v. The Commonwealth*, (1915) 20 C.L.R., at pp. 54-110.

#### **Meat Supply (N.S.W.) Act.**

The constitutionality of the Meat Supply for Imperial Uses Act (N.S.W.) was challenged in the case of *Foggitt, Jones & Co. Ltd. v. New South Wales*, (1916) 21 C.L.R., 357. The plaintiffs, who carried on the business of ham and bacon curers and provision manufacturers and distributors, owned 243 pigs in New South Wales which they wished to take into the State of Queensland; that the Attorney-General of New South Wales claimed the right to prevent the plaintiffs from taking their pigs to Queensland; and that the Commissioner of Railways, acting on the instructions of the Attorney-General, refused to supply trucks to enable the pigs to be carried to the border of New South Wales and Queensland. On their behalf it was argued that the act was an interference with inter-state trade, and is therefore an infringement of section 92 of the Constitution. Section 92 secures to every owner of goods, as long as he is the owner the right to transport them from one State to another without interference by law: *The State of New South Wales v. The Commonwealth*, 20 C.L.R., 54.

In support of the Act it was contended that there was no distinction between the Wheat Acquisition Act 1914, and the Meat Supply for Imperial Uses Act 1915 (N.S.W.), and that the validity of the former measure had been sustained in the case of *The State of New South Wales v. The Commonwealth*, 20 C.L.R., 54.

The High Court, *per* GRIFFITH, C.J. and BARTON, ISAACS and RICH, JJ. (GAVAN DUFFY, J. doubting) held that the Meat Act went further than the Wheat Act, as it purported to authorize the Government of New South Wales to prevent the export of stock

by the owners thereof from that State to another State which was an interference with inter-state trade and commerce, and was, therefore, invalid as being an infringement of section 92 of the Constitution.

### **State Acquisition not complete.**

“It was suggested,” said GRIFFITH, C.J., “that this Act may be considered as operating to create a provisional or inchoate expropriation of the stock. But it cannot be so construed, for upon an expropriation of property all rights to the property pass to the Government. If it is not expropriation, the rights of disposition remain in the owner. Amongst those rights one is specially guaranteed to him by section 92 of the Constitution, namely, the right to use the property for the purposes of commerce and intercourse between one State and another without interference. It is impossible to accept the notion of interference with the right of removal across the border which is not an interference with the freedom of intercourse. It cannot be both an interference and not an interference. If it is an interference, it is forbidden by section 92. In my opinion, therefore, the action of the Government comes exactly within section 92, and so far as the Act of Parliament can be considered as authorizing that action it is invalid under the Constitution. *Per* GRIFFITH, C.J., 21 C.L.R., at pp. 361-362.

### **No Expropriation.**

Mr. Justice BARTON said:—“Where section 5 says that ‘all stock anywhere in New South Wales shall be held for the purposes of and shall be kept for the disposal of’ the Imperial Government, it means that the stock shall be kept in New South Wales. That means, in other words, that the stock shall not be transported across the border by the owner, and the first clause does not transfer the property in the stock from the owners. That expropriation could only have been effected by action under the second clause of the section, and no such action is shown by the respondents. It is clear therefore, that owners are prohibited while still owners, from using the right to transport their property across the border into another State—a right which there is no word in the *Wheat Case* to impair. The right is conserved by section 92 of the Constitution and its renewed assertion by us is necessary if we maintain the decision in the *Wheat Case*. It is impossible to uphold the reasoning upon which the judgments in that case proceeded without holding

inter-state commerce. Section 92 of the Constitution does not affect that right. Sections 3, 8 and 9 of the New South Wales Act can reasonably be, and ought, if possible to be, construed as referring only to matters within the jurisdiction of the State Parliament. I agree that the New South Wales Act in question is valid, and that the Commonwealth action fails."

Mr. Justice RICH said :—" I agree with the judgment of the Court and adopt what has been said by GAVAN DUFFY, J.," 20 C.L.R., at p. 111.

*The State of New South Wales v. The Commonwealth*, (1915) 20 C.L.R., at pp. 54-110.

#### **Meat Supply (N.S.W.) Act.**

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that the action taken under the sole authority of section 5 is a direct and flagrant infraction of section 92." : 21 C.L.R., at pp. 362-363.

Mr. Justice ISAACS said :—" It was contended by counsel for the State that all the State Parliament has attempted to do is to create some right in the Crown short, it is true, of absolute ownership, but in the nature of expropriation sufficient to enable the State to detain the stock in New South Wales so as to preserve and effectuate that right ; but what is that right in law ? It is undefined and undefinable. How would a Court declare or enforce it ? The argument proceeded as if the State Parliament had, so to speak, dedicated all exportable stock to the Imperial Government. That is, it had dedicated, not its own property, but the property of others to the laudable purpose of war provisions. Dedication of another person's property without his consent does not create a right against the owner known to the law. Unless it is a bare right of detention pending consideration whether a transfer of ownership shall be created under sub-section 2 of section 5 by making a ministerial order, it is not susceptible of legal description."

#### **Detention of Property.**

" But has any State the power, in view of section 92 of the Constitution to detain the property in course of inter-state transit for such a purpose. I am not, of course, speaking of detention for crime or to carry out any admitted power of the State and not having the object, direct or indirect, of affecting inter-state trade as, for instance, temporary detention undertaken as the initial step in an impended purchase. Detention in order directly or indirectly to prevent or regulate commercial operations between the States, however carefully it is phrased and however meritorious may be the impelling motive, is, to my mind, in open conflict with section 92 of the Constitution. That section makes Australia one indivisible country for the purposes of commerce and intercourse between Australians. It is beyond the power of any State Parliament, or even of the Commonwealth Parliament by any regulation of trade and commerce to impair that fundamental provision. I agree that the claim of the State Government must be denied and the prevention declared unlawful " : 21 C.L.R., at p. 365. Per ISAACS, J.

#### **Queensland Meat Act.**

The decision of the High Court in *Foggitt, Jones & Co. v. New South Wales* was re-considered and over-ruled by the same Court

in *Duncan v. The State of Queensland*, (1916) 22 C.L.R., 557, in which the validity of the Queensland Meat Supply for Imperial Uses Act (1914) framed in terms similar to the Meat Act of New South Wales was attacked.

The Queensland Meat Act, section 6, paragraph 1, declared that all stock and meat in Queensland "are and have become and shall remain subject to this Act, and shall be held for the purposes of and shall be kept for the disposal of His Majesty's Imperial Government in aid of the supplies of His Majesty's Armies in the present war." It then provides (paragraph 2) that upon the making of an order in writing by the Chief Secretary or his Under Secretary, all stock and meat mentioned in the order shall become the property of His Majesty and the property of the owner shall be changed into a right to receive payment of the value of the stock and meat taken. Heavy penalties are imposed for refusal or hindrance of delivery of stock or meat so taken. Section 7 of the same Act provides as follows :—"All persons whosoever including the owners, consignors, consignees, shippers, vendors and purchasers of stock and meat, and each of their agents, attorneys, servants, and workmen, are hereby prohibited from selling, offering for sale, disposing of, forwarding, consigning, shipping, exporting, delivering or in any manner whatsoever dealing with any stock or meat (whether the same is or is not actually appropriated to His Majesty by an order made under this Act), except only in pursuance of and under the directions and orders of the Chief Secretary." Heavy penalties are imposed for any infraction of this Act.

In *Duncan v. Queensland* the plaintiff sued the State of Queensland and John McEwan Hunter, the Minister for the Crown in the State of Queensland for the time being discharging the duties of the office of the Chief Secretary of the State of Queensland, claiming damages in respect of an alleged interference with the plaintiffs' free disposition of their cattle which they proposed to remove from Queensland to South Australia. The action came on for hearing before Mr. Justice ISAACS who, during the course of the hearing, directed certain questions to be argued before the Full Court, of which the following is the principal one :—" (1) Is the Queensland Meat Supply for Imperial Uses Act (1914) valid ; and if so, did it authorize the acts complained of ? "

**Findings of Primary Judge.**

The facts of the case as found by His Honor were as follows :— That the Queensland Government instituted a system by which, although they allowed the holders of cattle to deal with them as they thought fit within the boundaries of Queensland, and allowed the needs of the people of Queensland to be satisfied to the full, even in priority to the requirements of the Imperial Government, stock was not allowed to be taken out of Queensland alive or dead without the authority of the Chief Secretary, whatever the necessities of the people in the other parts of Australia. Fat cattle were never allowed to cross the border under any circumstances, but store cattle were allowed to cross by permission, which was granted only if the owners signed a document stating that in consideration of the Government abstaining from acquiring them under the Sugar Acquisition Act 1915—a totally different Act from the Meat Act, and having no reference whatever to the Imperial Government—the owner undertook to return the cattle within six months and deposited a sum of money as security. Then the proper official would, in the terms of the authorized form, “ permit their temporary removal across the border.” On fulfilment of the undertaking to bring the cattle back the deposit was returned. Instructions were accordingly issued to the Government inspectors of stock. Knowing of this practice the plaintiffs allege that they, to their pecuniary loss, were prevented during March and April 1916, from sending some 300 cattle to another State. In May they formally requested permission to remove 600 fat cattle intending, as they alleged, to take them for the purposes of sale to South Australia, the population of which is largely dependant for its food supply upon Queensland meat, and higher prices absolutely and relatively prevailed there. The permission was refused, and it was contended by the plaintiffs that in the circumstances the attitude of the Queensland Government, with all the force of the State behind it, constituted a real prevention which as law-abiding citizens, the plaintiffs were not called upon to oppose with force, but may challenge in a Court of law. The writ was issued on the 23rd of May 1916 but the plaintiffs further say that the events subsequent to the issue of the writ were not only to be regarded in relation to damage, but as evidencing the character of the whole of the Acts, that is, the conduct, on the part of the Queensland Government, and as showing in combination with the forms of permit, issued long before the action was commenced that the Government was really proceeding in the main for local

purposes with the object of preferring the Queensland meat companies and Queensland trade, as opposed to other Australian interests. They said that, although to some extent Imperial interests might be served, they were subsidiary to the immediate objects the Government had in view—namely, the monopolization by Queensland of the trade in cattle, including the supply to the Imperial Government subject always to the full supply of the inhabitants of Queensland. Beside the reference to the Sugar Acquisition Act in the form of permit, and the significant fact that the acquisition of the cattle in June was not under the Meat Supply Act, but under the Sugar Act—of local aspect only—the plaintiffs adduced evidence, uncontradicted, with reference to a specific application made personally to the defendant Hunter, as Minister of the Crown, on behalf of the Australian Chilling and Freezing Co. Ltd. of New South Wales. That Company had been freezing meat for the Imperial Government since March 1915, and the firm of W. J. Walker & Co. had been sending it on. The Company was dependent for the supply to the Imperial Government upon Queensland supplies. The general manager, Mr. McAdam, accompanied by Mr. Howie, the London manager of Walker & Co., asked Mr. Hunter for permission to bring cattle over the border offering any guarantee that might be demanded that the shipments should be for the Imperial Government only. This was refused, and no reason given. This, as is apparent, may have been greatly detrimental to the Imperial interests. The plaintiffs contended, that in view of the circumstances the Court should, upon the whole evidence, infer that the acts complained of were not a *bona fide* exercise of the powers conferred by the Meat Supply Act whatever those powers might be. They argued that if the Meat Supply Act was to be regarded as a general regulation of trade all over Queensland—supposing that were a sufficient vindication of inter-state prohibition—it has not been followed, because the Governments have confined their actual interferences to inter-state trade only, and that the acts complained of were, in any case, a violation of the Constitution inasmuch as the obvious *discrimen* of the Queensland Government in their executive conduct was the crossing of the border.

#### Grounds of attack.

The substantial questions raised in the case were :—(1) What was the effect of these legislative provisions ? (2) Were they obnoxious to the mandate of section 92 of the Constitution ? On

behalf of the plaintiffs it was submitted that the Queensland Meat Act was unconstitutional and could not be relied upon to prevent the plaintiffs from sending live stock to South Australia. The suggested construction of section 92, that it only requires that trade, commerce and intercourse between the States shall be free from pecuniary imposts, it was argued, did violence to the language of the section. It was inconceivable that, if that were the object of the Constitution, it should have used the word "free," seeing that the most obvious interference with freedom was prohibition.

For the Commonwealth it was argued that section 92 of the Constitution is directed against governmental interference with or control of trade, commerce and intercourse among the States and does not deal with the contracts or transactions of citizens. The section is a limitation upon the powers of the States to restrict inter-state trade.

#### Case for the State.

On behalf of the State of Queensland the Court was invited to reconsider its decision in *Foggitt Jones & Co v. New South Wales*, 21 C.L.R., 357. In considering whether section 6 (1) and 7 of the Meat Supply for Imperial Uses Act are an infraction of section 92 of the Constitution, circumstances existing at the time the Act was passed may be looked at in order to determine what is its nature. The existing necessity to obtain supplies of meat for the army shows what was the intention of the Legislature. The effect of the Act was to remove stock and meat from commodities which might be the subject of trade and commerce. The State might validly have taken the whole property in all the stock and meat in Queensland (*New South Wales v. The Commonwealth*, 20 C.L.R., 54); it might equally take from the owner something less than all the rights of ownership. Whether section 6 (1) of the Meat Supply for Imperial Uses Act gives the Imperial Government an option of purchase or imposes a trust upon the owner, it has the effect of preventing stock and meat from being subjects of trade and commerce.

It was contended that section 92 of the Constitution meant that trade, commerce and intercourse between the States shall be absolutely free from anything in the nature of taxation, using that word in its largest sense. It does not operate as a prohibition against a State preventing goods or persons entering or departing

from the State, unless and until the Commonwealth intervenes by a law which is inconsistent with and therefore under section 109 of the Constitution over-rides the law of the State.

The section was limited to freedom from pecuniary imposts only ; it did not mean freedom from all restrictions. Section 112 assumes that a State had power to make inspection laws with regard to goods entering into or passing out from the States, and the State is not expressly given that power by the Constitution and cannot have it if the freedom secured by section 92 includes freedom from all restrictions. The impeached Meat Act it was contended, was a legislative withdrawal of goods from all commerce. The Act did not forbid the taking of cattle over the border as such.

#### **Validity of Meat Act affirmed.**

In the result the majority of the Court, GRIFFITH, C.J., HIGGINS, GAVAN DUFFY, POWERS and RICH, JJ., (BARTON and ISAACS, JJ. dissenting), held that the Meat Supply for Imperial Uses Act 1914 was a valid exercise of State power and authorized the executive acts complained of.

The Chief Justice (Sir SAMUEL GRIFFITH) in delivering judgment said :—" The powers of the Legislature of Queensland extend to making laws for the peace, order and good government of that State in all cases whatsoever. In my judgment a law having for its object to make the stock bred in Queensland available for the food of the Imperial forces is a law conducive to the good government of that State as part of the Empire. The Meat Supply Act purports to provide that the owners of stock the meat whereof is intended for export or may be made available for export, and the flesh of such stock when killed, shall be deprived of the right of free disposition as owners, and that their right of disposition shall only be exercised with the approval of the Chief Secretary acting as well for the Government of Queensland as for the Imperial Government, with the object that the stock and meat shall be available for use, if as required, as food for the Imperial forces in the present war."

#### **Dedication to public use.**

" I am of opinion that the declaration that the stock and meat shall be held for the purpose of and shall be kept for the disposal of His Majesty's Imperial Government operates as a dedication of the stock and meat to public purposes. . . . In my opinion the

effect of the Act is to create in His Majesty in right of the Imperial Government a right of the nature of a special ownership or interest in the stock and meat which is inconsistent with its use for any other purposes just as a dedication of the highway deprives the owner of the soil of the right of digging up and removing the soil. In this view, the plaintiffs are claiming damages for being prevented from exercising a right of dominion over property over which they have no such right of dominion as they claim to exercise."

#### **In custodia legis.**

"From another point of view I am of opinion that the Act may be regarded as placing the stock and meat *in custodia legis* and the possessor in a position analogous to that of the receiver of property appointed by a Court of Justice, who, although he may himself be the owner of the property, is debarred from exercising any right of ownership except subject to the control of the Court. I cannot conceive of any objection to the validity of such a law. In this view also the plaintiffs' case fails."

#### **State Powers over Property.**

"I am of opinion that the Act does not touch the subject in trade and commerce in the sense in which that term is used in section 92 of the Constitution. It is not, and cannot be, denied that under the Constitution the States retain full and exclusive power to make laws with respect to the acquisition of property real or personal, situated within their territorial limits, the conditions of the use and enjoyment of the such property, the capacity of the possessor or any other persons to dispose of it, and the rights of succession to it. All these are usual incidents of property. But capacity of disposition does not of itself connote ownership nor does ownership of itself necessarily connote capacity of disposition. In the jurisprudence of other countries provisions for depriving a person who is entitled to the whole beneficial interest in property of the capacity of free disposition are common, and they are not unknown in some parts of the British Dominion. An infant or an idiot may be the owner of property but has not capacity of disposition. At present, the age limit for capacity of disposition of property is in Australia 21 years, but it cannot be disputed that that age might be either raised or lowered by State law. Capacity of disposition is therefore, only one of the usual incidents of the ownership of property, and it is as much subject to the laws of the country in which the

property is situated as any other incident of ownership. Another mode of limiting the right of disposition of property is by attaching the condition of inalienability or immobility to the property itself. Either mode is equally effective so far as regards any claim of the possessor to be allowed to dispose of the property."

### **Extra commercium.**

"The doctrine that particular property may be put *extra commercium* is a very old one, recognized by the Roman law. To take an instance very often used in Roman jurisprudence, that of slaves—if the law allows living human beings to be bought and sold they are a subject matter of trade and commerce. But when the law no longer allows them to be bought and sold the term 'trade and commerce' is no longer applicable to them. So, if the law forbade the sale of a child under the age of 10 without the consent of the Praetor, or apart from the sale of his father or mother, such children would only be the subject of trade and commerce upon those conditions. Similar restrictions could be applied to any other form of property. The plain effect of the provisions of the Meat Supply Act which I have read is to qualify the general law as to the incidents of ownership of property with respect to stock and meat of the specified kind by depriving the owner of the capacity of free disposition, so that he has no power, except under the directions and orders of the Chief Secretary, to make any disposition of such stock or meat for any purposes whatsoever."

"The Act deprives the possessor of the capacity to move them from the place in which they are without which movement they cannot pass into another State. Having regard to the area of the State of Queensland, the importance of the denial of this capacity is obvious. But this result is not that which it is the main object of the Act to accomplish."

### **Denial of right to sell.**

"The effect of the Act is that the stock and meat in question cannot under the law of Queensland become the subject matter of trade and commerce, since the possessors of them are denied by law any capacity to dispose of them at all. That its main object was to conserve the stock and meat for the use of the Imperial forces.

"I am of opinion," said the Chief Justice, "that the Act is not obnoxious to section 92 of the Constitution because it does not



impose any restriction upon export conditioned upon passing from one State into another, and is, therefore, for the reason I have given in an early part of this opinion not within the terms of that section. If section 92 is to receive the wide meaning intended by the plaintiffs', it not only involves what is in effect a partial withdrawal from the State of their legislative power to control the law as to the disposition of any property which the owner may desire to employ in inter-state trade and commerce, but leaves that law stereotyped in the form in which it existed at the date of the establishment of the Commonwealth, without substituting any other legislative authority in place of the States. For it cannot be suggested that the Commonwealth power to make laws with respect to trade and commerce can override the State laws as to such matters as the following, amongst others: whether a particular trade may be lawfully carried on within the State, or whether a particular class of persons shall have capacity to dispose of property, or whether particular property shall be placed *extra-commercium*. That such a result could have been contemplated is, to my mind, unthinkable.

"I am unable," said the Chief Justice, "to distinguish the present case in principle from the decision in the *Wheat Case*, 20 C.L.R., 54, where the Court held that a Statute of New South Wales which had the effect of expropriating all the wheat in that State to the Government, was not obnoxious to section 92 since the new owners who alone had capacity to dispose of the wheat, could freely exercise that power by exporting it to another State or not, as they please. The judgment was based on the acquisition of the complete ownership. But, in truth, the only material incident of ownership then in question was the capacity of free disposition. If the only person who is capable of disposing of property is left free to dispose of it as he pleases, there is no interference with freedom of disposition.

"The conclusion at which I have arrived," said the Chief Justice, "is inconsistent with the decision of this Court in the case of *Foggitt Jones & Co. v. New South Wales*, 21 C.L.R., 357, in which it was held that a Statute of New South Wales not distinguishable in its terms from the Act now under consideration, did not authorize the Government of New South Wales to prevent the export of stock. For all these reasons I am of opinion that the Meat Supply Act is not obnoxious to section 92 of the Constitution and is valid, and that it authorized all the acts complained of which

were committed before action brought." *Per* GRIFFITH, C.J. in *Duncan v. The State of Queensland*, (1916) 22 C.L.R., at pp. 570-582.

In reviewing his judgment in the earlier case, the Chief Justice (Sir SAMUEL GRIFFITH) frankly said :—" That case was very briefly and, I regret to say, insufficiently, argued and considered, on the last day of the Sydney sittings. The section corresponding to section 7 of the Meat Supply Act was not referred to either in argument or in the judgments. It is not suggested that the stock were impress with anything in the nature of a trust, or were placed in *custodia legis*. The arguments which now commend themselves to me as conclusive did not then find entrance to my mind. In my judgment that case was wrongly decided, and should be over-ruled" : (1916) 22 C.L.R., at p. 582.

Mr. Justice BARTON said :—" We are referred to the title of the Statute, namely, ' An Act to Secure Supplies of Meat for the uses of His Majesty's Imperial Government during war, and for other purposes.' But if it bears upon commerce among the States so directly as to amount to a regulation in a relatively immediate way, it will be not saved by name or form. It is the effect that is the vital consideration, and that can only be ascertained from the substance of the enactment : *R. v. Barger*, 6 C.L.R., 41. Then it is urged that the effect upon inter-state commerce is only incidental. That contention can in no wise be accepted. The restriction of inter-state commerce is no mere incident, but a factor of these provisions."

### Motive of the Meat Act.

" The motive expressed in the title may, if the word be preferred, be called its ultimate object, but the main part of its immediate object is the withholding of cattle from transport into other States. If there had been no inter-state commerce in Queensland cattle, the supply of meat for the Imperial Government could have been secured by the mere acquisition of all or any of the live stock directly, or under some such enactment as section 6 (2) together with provision for taking possession of the stock after acquisition. But as the traffic existed and was great, its cessation could better be effected by such provision as section 6 (1) and 7 (1). Still, if the restrictions imposed are not infringements of the Constitution, neither the plaintiff nor anyone else can complain. Then is the Constitution

infringed ? It is the Supreme law of all the States (see covering section v.) and section 92 is therefore the law of Queensland, just as it is that of any other State. On its face it is unqualified."

**Meaning of Inter-State Freedom.**

"But the defendant seeks to show that section 92 is not infringed if the burden imposed on inter-state commerce is not a border tax. The words 'absolutely free' are said to refer only to fiscal burdens; and therefore the right is claimed for a State to restrict or even prohibit inter-state trade as it pleases so long as it abstains from placing on it any monetary charge. I am not of that opinion, but I think the learned Chief Justice interpreted the provision accurately when he said last year in the *Wheat Case*, 20 C.L.R., 54, that 'section 92 may . . . so far as it relates to commerce, be paraphrased thus: Every owner of goods shall be at liberty to make such contracts for the transportation of goods from one State to another as he thinks fit without interference by law.'"

"Section 92 must on any construction include a prohibition of inter-state customs duties and the like and section 112 plainly reads as authorizing the imposition by a State of certain charges which are not within the prohibition. Section 112 recognizes State inspection laws as outside the prohibition. But if any attempt is made to convert them into instruments for the fettering of inter-state commerce, the deterrent provisoes that 'the net produce of inspection charges shall be for the use of the Commonwealth, and that the Parliament of the Commonwealth may annul such laws altogether,' afford two effective safeguards. The truth is that, whether the charges are made on goods inspected as they pass into or out of the States or on goods inspected in any other part of the States, they are not taxes but merely compensation for services rendered."

Mr. Justice BARTON continued:—"It is established by American cases too numerous and too well known to detail, that external and inter-state commerce being regarded as a subject of national character, requiring uniformity of regulation, Congress alone can deal with such transportation; that its non-action is a declaration that such commerce 'shall remain free from burden imposed by State legislation'; otherwise there would be no protection against conflicting regulations of different States, each legislating in favour of its own citizens and products, and against those of other States."

**Interference with Inter-State trade.**

“ Congress has preserved the policy of non-interference with inter-state trade ; hence the Supreme Court has consistently upheld the doctrine that no State can impose restrictions whether fiscal or other, by legislation or otherwise, with the effect of substantially interfering with that commerce. So that the Supreme Court of the United States interprets the freedom of inter-State commerce so far as State legislation would affect it, precisely as the learned Chief Justice interpreted section 92 in the *Wheat Case*, 20 C.L.R., at p. 68. Inter-state commerce was made the subject of a charter which for the purpose of that commerce eliminates the very idea of State boundaries and makes the people of the whole Commonwealth in their commercial and personal dealings with each other ‘ absolutely ’ one.”

**Incapacity to dispose of goods.**

“ It was contended that the enactments now challenged are within the State powers because they have placed cattle ‘ *extra commercium*, ’ outside the pale of commerce. There are two answers to this argument. The first is that to place a subject of commerce outside the pale of commerce, that is, to deny to the owner its use in trade, is not within the power of a State so far as the denial prevents its use in inter-state trade. The right goes with the ownership ; it is secured to the owner by section 92 ; that is the meaning of the *Wheat Case*, 20 C.L.R., 54, where it was held that the State of New South Wales in acquiring the wheat, which it could constitutionally do, acquired the right of determining for itself, as the owner, whether it would transport the wheat outside New South Wales or would retain it there.”

**State Ownership.**

“ It was the ownership which had given the previous proprietors the right of inter-state trade, and the ownership had lawfully passed to the State, which necessarily had thenceforth the right to dispose of it in any way or to retain it, just as the previous owner had. If, then, a State, not acquiring the ownership of the subject of commerce (which was therefore a subject of inter-state commerce), assumes to deprive the owner of that right so definitely secured by the Constitution, the State is to that extent violating the Constitution, no matter whether it applies the term which I have quoted to the operation or not. The distinction upon which the action of

the Legislature of New South Wales was held valid in the *Wheat Case* is the very distinction on which different action of that State was held unconstitutional in the case of *Foggitt Jones & Co. v. New South Wales*, 21 C.L.R., 357. There the State had acted under section 5 (1) of a Meat Supply Act, like that now in question. That provision corresponds exactly with section 6 (1) in the Queensland Act. This Court held that the provision relied on did not constitute any authority to the defendants for their action in preventing the transit of live stock of the plaintiffs into Queensland."

### **The Right of Ownership.**

"If the *Wheat Case* is correct, and no doubt has been thrown upon it, then the case of *Foggitt Jones & Co. v. New South Wales* is also correct, because it is the strongest implication from the decision in the former case that an interference with the exercise by owners of the right of inter-state commerce cannot be justified; and that it is only when and because the right has passed to a new owner that the latter can exercise his own volition whether, having the right, he will exercise it or not. The principle of the *Wheat Case* rests on good foundation. But the State right arrogated in this case, even if supported by a majority of this Court, rests, I firmly believe, on the foundation forbidden by the Constitution."

### **Extra commercium.**

"The fact is that the phrase '*extra commercium*' does not suffice to disguise an argument which was, as a matter of course, rejected in the *Oklahoma Case*, 221 U.S., 229. That argument was that the ruling principle of the State Statute was 'conservation not commerce,' and that such conservation was within the right of a State. But no rights of a State is a valid pretext for interference with the right of the federated people. It cannot avail to break down that right, and section 107 gives it no shred of power to do so in place of the paramount command of section 92.

"So far for the first answer to the argument that the goods have been placed *extra commercium*. The second answer is that whatever force that operation might have, it has not taken place. At the best the cattle did not cease to be subjects of some commerce, for they may be purchased by the State, or as is argued, by the Imperial Government. They therefore remain subjects of inter-state commerce. But an owner has the right to trade until the State withdraws it so far as it lawfully can. If, then, it attempted with-

drawal leaves that right of intra-state commerce subsisting even in part, what is the other right which it affects to withdraw in attempting to place the goods outside commerce. Plainly, the right of interstate commerce with which section 92 forbids it to tamper."

### **Immovability of Goods.**

"Then we are told that all that section 92 forbids is legislation 'conditioned on the passage of goods from one State to another.' It is difficult to grasp the precise meaning of this contention; but I take it that it means that sections 6 (1) and 7 render the cattle immoveable; that is to say, keep them where they are, and that this does not involve an interference with inter-state commerce, because it looks in another direction into Queensland and not towards New South Wales or South Australia. Well if I am looking in one direction I am looking away from some other; if I drive live stock to the north I am driving them away from the south. The old question remains, what is the effect and operation of the law? If its necessary effect is to deprive the owner of his constitutional rights, it does not matter what phrase has been applied to the process. If, for instance, knowing that stock owners are in the habit of driving there cattle southwards all the way from North Queensland to Melbourne or Adelaide for sale, I attempt to force them to abandon that trade by commanding them to keep their cattle within Queensland or to drive them in a contrary direction to a port in the north of Queensland for the shipment of them or their meat, say to India, my action may not be expressly conditioned on the passage of the stock from State to State. But who would venture to say that it is not, however laudable its motive, the deliberate and intentional prevention of inter-state trade? Hitherto, motives have not been allowed as excuses for violations of the Constitution; though, if the present decision be taken as a precedent they may be in future."

### **The doctrine of dedication.**

"Then it was argued that the operation of one or both of these sections impeached, was analogous to the 'dedication' of the highway or a path, although it is admitted not to be the same thing. But how is an enactment to be saved by such a name. If the cattle are not dedicated how much does the mere term convey in this case. So, as to the contention that the cattle have been placed in *custodia legis*; that it is a term well understood in regard

to legal proceedings and their results ; but what effect can its use have in preventing the plain construction of this Statute ? I fail to see its applicability as conveying a legal effect over-riding that construction. In spite of all these names the question still is whether the legislative action of a State, whatever name is applied to, interferes with inter-State commerce in a sense that it forbids the transmission or receipt by the owner of the chattels or their value in goods or money when exchanged from State to State. If it does so it is *pro tanto* repugnant to the Constitution. The question is still one of the necessary operations of the Statute. Any other principle will result in authorizing production of the forbidden effect by the device of the skilful employment of evasive words."

### **Native Game.**

" The defendants sought to sustain their position by resort to the case of *Geer v. Connecticut*, 161 U.S., 519. It was contended that, like the game the subject of that case, the cattle here were by the effect of section 6 (1) and 7 (1), placed beyond the domain of commerce. But in the case cited the game were at the outset held to be at common law the common or collective property of the State and could therefore be retained for the State or subjected at its will to laws imposing restrictive conditions as to sale and transport. That was the result of initial State ownerships, and would have been the result as to these cattle if the State had acquired them by law before the Act complained of ; but it is not the position of private property like the cattle of graziers so long as their ownership remains."

### **The right of free disposition.**

" The right of free disposition is an incident of the ownership of property not, as urged, merely because the law of the country in which the property exists has said so. The real reason is that ownership cannot in the nature of things be absolute without that right. The law of the country—that is the particular States—can take away or diminish that right to any extent not forbidden by the Federal Constitution. But it is the attribute of ownership that section 92 conserves to all the extent necessary for the purpose of maintaining the freedom of inter-state trade, and with it the unity of the Australian people. And conserved as that attribute is to that necessary extent it is beyond the touch of any State. To sanction what is attempted here is to yield to a palpable attack

upon the rights and the unity of which I have spoken, and against which it is my duty to defend the Constitution which guarantees the right."

**A decision of grievous effect.**

"The decision of the present case, if followed hereafter, will be of grievous effect upon the future of the Commonwealth, for it tends to keep up the separation of its people upon State lines by imputing to the Constitution a meaning which I venture to say was never dreamed of by its framers; a meaning which will probably result in the very dangerous dislocation which its provisions are intended, and, in my judgment, aptly framed, to prevent. If section 92 is not adequate to forbid the conduct complained of, it is difficult, indeed, to frame a provision which would have that effect. To say that one regrets to differ from one's learned brethren is a formula that often begins a judgment. I end mine by expressing heavy sorrow that their decision is as it is. My conclusion, however, is that sections 6 (1) and 7 of the Queensland Meat Supply for Imperial Uses Act of 1914 prejudicially affect inter-state commerce, and that to the extent to which that effect exists, they are *ultra vires* and invalid." *Per* BARTON, J. in *Duncan v. the State of Queensland*, 22 C.L.R., at pp. 583-605.

Mr. Justice ISAACS said:—"This is one of the most important cases, if indeed it be not the most important of all the cases, that have ever occupied the attention of this Court. It concerns what I regard as one of the fundamental pacts of the Constitution under which we live, the absolute right of freedom of trade and intercourse between the States. The result of any decision as to that right is so momentous as to impose upon any Judge having to determine it as a permanent feature of the organic law of Australia an enormous weight of responsibility."

**Is Inter-State freedom a sham?**

"The real question we are called upon to decide may be thus succinctly stated: 'Is the constitutional declaration of inter-state freedom of trade a reality or a sham?' The Queensland Meat Supply for Imperial Uses Act has been pronounced valid notwithstanding that declaration, and even assuming that on the true construction of the State Act it authorizes all that is complained of. That pronouncement which I must say at the outset is entirely irrespective of any question of war or Imperial interest, but is based



on the right of any State at any time, in peace no less than during war, and to any extent it pleases to nullify the provisions of section 92, necessarily reduces the Constitution, so far as it purports to guarantee to the people of Australia free trade between the States, to a worthless scrap of paper."

#### **Imperial interests a stalking horse.**

"The Imperial Government must not be treated as the stalking horse for supporting what was done here. Imperial interests, which to the utmost extent of the law every loyal subject and certainly every member of His Majesty's Courts of law would endeavour to maintain in this crisis of our history, are not to be taken as the subject matter of our decision; for, if some Queensland meat company were substituted for the Imperial Government, the same reasoning would apply, and therefore the same conclusion would follow."

#### **The New South Wales Meat Act.**

"Universality of section 92 of the Constitution which is an essential covenant beyond the power of Commonwealth and State alike to limit, has been more than once declared by the Court. The latest instance was *Foggitt Jones & Co. v. New South Wales*, 21 C.L.R., 357, in May this year and with respect to a precisely similar State Act passed by New South Wales. I cannot agree with the learned Chief Justice in his observation that that case was in any way hastily considered. One of the judgments was written—my own—and I refer to it at page 264 to show that the very matters now dealt with were argued and considered. The result was then thought to be, as indeed it is, the necessary conclusion from the most carefully considered judgment in the *Wheat Case*, 20 C.L.R., 54. I refer to the judgments of the Chief Justice at p. 68, of BARTON, J. at p. 80, of myself at pp. 99-100, of GAVAN DUFFY, J. at p. 105, of POWERS, J. at p. 107, and of RICH, J. at p. 111. The point made was this: if ownership is transferred from one man to another then it is only the new owner who can henceforth claim the rights of inter-state trade under section 92: in the former owner having no property whatever has nothing on which section 92 can operate. In *Foggitt Jones & Co.'s Case*, that well considered principle was applied and the man who was allowed to retain his general ownership was held to be protected in his right to sell inter-state what he had, free from State prohibitions."

**Property without power of sale.**

"We have, however, in this case a decision that notwithstanding the general property is admittedly resident in the plaintiffs they are debarred from selling what they are conceded to have, and merely because the State law says they shall not. That obviously leaves section 92 a mere husk a vain and empty form of words, the sport of each and every State. The States have it in their clear power under this decision to make themselves, as they were before Federation, water-tight compartments for the purposes of trade. They may, it is held, forbid holders of stock to sell to anyone but a single individual named, that individual need not be resident in Queensland; it happens in this case to be the Imperial Government; it might as well for all legal effects be the American Government for the Queensland meat exporter. If the State can then forbid the export from Queensland of the commodity absolutely, it can do so conditionally, and that condition may be the payment of the sum of money—which in pre-Federation days was called a tax. There is scarcely any limit to a State power of overcoming the fine-sounding words of section 92. Never was there a clearer instance of keeping the word of promise to the ear and breaking it to the hope."

**Freedom from taxation not the test.**

"One new point was raised in argument and in my opinion it was the only one that ought to have given rise to a moment's serious consideration. I shall deal with that at once. 'Absolutely free,' it was contended, has reference to pecuniary burdens only. Reliance for this was placed principally on section 112, which expressly recognizes that independently of any specific authorization or reservation of the Constitution the State retains power to enact and execute 'inspection laws' as in America, and section 112 does expressly authorize charges to be levied, which by the arguments it is assumed would be contrary to section 92. But such charges are forbidden by section 90, and 'inspection laws' so long as they were confined to their true scope and character, were never regarded as regulations of inter-state trade and commerce. *Story on the Constitution*, section 1017 (5th ed., p. 739), says:— 'Inspection laws are not, strictly speaking, regulations of commerce, though they may have a remote and considerable influence on commerce.'"

“As to section 51 (1.) there is a very large field for legislation with respect to inter-state trade and commerce, for its regulations so as to preserve its freedom, to encourage and promote it, in entire accordance with section 92.”

### **Jus disponendi.**

“This all points to the primary meaning of freedom of trade. spoken of in section 92, not being altered by the context to ‘pecuniary freedom’ only. It means complete freedom of disposition; or, to employ a term greatly used during the present discussion, unfettered *jus disponendi*. We have then to consider the force of section 92 with the words ‘absolutely free’ unabridged.”

“The effect of section 92 of our Constitution may, sufficiently for the present purpose, be seen by an illustration. A man in one State has goods belonging to him which he wishes to sell; and in another State a man desires to buy those goods, and has money which he is ready to offer in exchange for them. Section 92 says that the man with the goods is to be absolutely free to sell and deliver his goods to his inter-state neighbour, unhindered by any interference of the Commonwealth or State, and the other man is to be equally free to purchase those goods and receive them and pay for them. The State singly or combined cannot lawfully prevent the owner of the goods or the owner of the money from so acting in respect of what they possess. The substantive right of sale and purchase carries with it on recognized principles, and by direct force of the words ‘internal carriage or ocean navigation,’ all incidental rights, such as transportation by land or sea, of goods and the passage of individuals.”

“The moment the State says ‘You may keep but shall not sell your merchantable goods, not because they are deleterious but because they are not; then trade and commerce are directly prohibited; and though this is still perfectly competent to the States so far as relates to its purely internal trade, it is, in my opinion, invalid if section 92 is to have any operation at all as to inter-state trade.”

### **Derogation from freedom.**

“To give any person a monopoly, as has been done by section 6 (1), is, as Lord PARKER, for the Privy Council, said in the course of his judgment in the *Attorney-General of the Commonwealth v.*

*Adelaide Steamship Co.*, (1913) A.C., 781, at p. 794; 18 C.L.R., 30, at p. 32:—‘A derogation from the common right of freedom of trade.’ The whole of that judgment assists in the meaning of ‘freedom of trade,’ but the extract I have quoted shows very clearly that the monopoly given by section 6 (1) is *pro tanto* a derogation from the freedom of trade. And so far as it extends to inter-state trade it is to my mind clear to demonstration that it is a violation of section 92.”

“Laying aside the Federal Constitution, the Queensland Parliament could prevent any man from leaving Queensland and from taking goods out of Queensland. And section 107 of the Constitution preserves all the former Parliamentary powers, except such as are exclusive in the Federal Parliament and except such as are withdrawn from the States. Now, if inter-state trade is by section 92 declared henceforth to be ‘absolutely free,’ the power to fetter it is directly withdrawn from the States. And it must be remembered that the affirmative power of the Queensland Parliament can rise no higher than its State Constitution, and by section 106 that is declared to be ‘subject to the Commonwealth Constitution:’ ”

“I refer to the proposition that the ‘pith and substance’ of the Meat Supply Act, or, in other words, its ‘object,’ is the internal regulation of property a matter entirely within the reserved powers of the States and therefore any provision it contains, direct or incidental, to prevent or prohibit inter-state trade to carry out the ‘object’ of the Act, is no contravention of section 92 of the Constitution, even though such a prevention or prohibition *per se* would be unlawful as a violation of that section. It cannot be denied that the ‘pith and substance’ of an Act is what it in substance enacts, and its ‘object’ must equally be gathered from what it enacts.”

“I apprehend that section 92 is not a competition between Federal and State powers. It is an exception from both, and so with whatever object the interference with had as such takes place, either in a State Act under the general powers of the State or in a Commonwealth Act under one of the undoubted affirmative Commonwealth powers, the forbidden thing is done, and the object is immaterial. I endeavoured to make this clear in my judgment in the *Wheat Case*.

“ There is of course nominally a concession that trade must be absolutely free ; but that concession is immediately cancelled by the contention that when the State says ‘ We grant a monopoly of acquisition to A.B. and you must not take your property out of this State to another State where you might lawfully sell it to another person,’ it is not interfering with that freedom. The answer is contained in the well-known maxim *Quando aliquid prohibetur fieri ex directo, prohibetur et per obliquum.*”

### The Right of Property.

“ As to the proposition of the Queensland Meat Supply Act is a law relating to the rights of property there is I apprehend, a dilemma from which I see no escape for the defendant. Either the right of freedom of trade is a property right, or it is not. If it is not, then the Queensland Parliament in denying freedom of trade in exporting cattle, have not taken away any rights of property and the suggestion that the States had the right to regulate property is irrelevant. On the other hand, if it is a right of property, then it is inevitable that section 92 of the Constitution protects that right of property even as against the State.”

### Intercourse.

“ As to ‘ intercourse ’ I repeat what I have said on a former occasion that intercourse goes beyond ‘ trade and commerce ’ ; that is, beyond commercial intercourse. Its non-inclusion in section 51 (1.), in section 98, or anywhere where trade or commerce among the States finds reference in the Constitution, except section 92 where it is declared to be ‘ absolutely free,’ leads to the inevitable conclusion that individual freedom of movement from State to State is the constitutional right of Australians.”

“ Finally it must be remembered that, if the State Act is valid as dealing with property only and leaving nothing for inter-state trade and commerce to operate on, there is no cure for the matter by means of Commonwealth legislation under section 51 (1.). The Commonwealth cannot alter property rights under that section ; and any suggestion that the absence of Commonwealth legislation is material is a tacit assumption that the matter dealt with by the State is trade and commerce and not property. So far as intercourse exceeds commercial intercourse, of course the Commonwealth has no legislative power whatever.”

**Capacity to dispose of Property.**

“As to the proposition this is a law relating to capacity to deal with property that argument is that the State Act has taken away the personal capacity of the owners of the cattle to sell their property. Again I respectively observe that equivalents are false coin in construing any document. And I would further observe that the dilemma once more presents itself, for, if capacity is taken away by the State Act, it is maintained by the paramount force of section 92 for the same consideration that make it an equivalent of the one make it an equivalent of the other. But, in truth, it is a misleading term in this relation. ‘Capacity’ is a personal condition. To say a person is struck with incapacity means in law that he is placed in a special class who are rendered by law incapable of doing acts that are within the competence of the ordinary normal citizen.”

“It is not the same as prohibiting a normal citizen from doing an act. It treats the act as lawful if done by the normal citizen ; whereas the prohibition proper treats the act as an unlawful act if done by the normal citizen.”

“In the result, though Australians have hitherto thought that their Constitution had placed inter-state trade on a basis broader than in Canada and more inviolable than in America (see *Quick and Garran on the Australian Constitution*, at p. 845), a belief to some extent at all events shared by this Court in prior cases and even by the Privy Council itself (see *Colonial Sugar Refining Co. v. Irving*, (1906) A.C., 360, at p. 367, last line), it now appears that not only was that a wide-spread error, but that inter-state trade can exist only so far as the conflicting interests and desires of the several States will allow it. I also cannot add the traditional judicial regret at inability to concur in the decision.” *Per ISAACS, J. in Duncan v. The State of Queensland*, 22 C.L.R., at p. 605-627.

**State law of property.**

Mr. Justice HIGGINS said :—“The expression ‘absolutely free’ in section 92 as applied to commerce, I take to mean without obstruction or restriction. There is to be no obstruction or restriction because of State boundaries. State boundaries are to be forgotten for the purpose of trade, commerce or intercourse. The section does not mean that the subjects of commerce are not to be subject to the State law as to rights of

property. That is to say, whoever has power as owner or mortgagee or otherwise to sell any specific cattle shall not be obstructed or hindered from sending them across the border of his State for sale or after sale. The section does not give any power of sale to those who have not got it by the law of their State. If a mortgagee has the power of sale, he may sell across the boundary: if he has not such a power, section 92 does not give it. If under the laws of the State an owner under 21 years or a married woman or a lunatic has no power to sell; section 92 does not give the power. If an owner of stock or other commodities has covenanted not to sell them, section 92 does not release him from his covenant; if he has given to somebody an option of purchase, that option is enforceable against him by action. In other words, trade among the States is to be 'absolutely free,' as to commodities which are vendible, on the part of those who are competent to sell within their own States. If this were not the meaning, a State could not, in the case of drought, distribute seed-wheat amongst its farmers with the conditions annexed that it should not be eaten or milled or sold—the farmers would still be able to insist on the right to sell the wheat to farmers across the State borders. Given an owner or other person who has power to sell, and given an article which is not removed from the scope of commerce by the laws of the State, there is, under this section, to be no obstruction or restriction at the boundary of the States."

"The Meat Supply Act of Queensland, section 6 does not, until an order to that end is made by the Chief Secretary, divest the plaintiffs or the other owners of stock of the ownership. The Act could have so enacted, could have confiscated the stock and vested them in the British Government; and if it had done so, the plaintiffs could have no possible pretence for asserting the right to sell, either in Queensland or across the border. All that the Act has done as yet, is to declare that the stock are to be 'held' for the purpose and 'kept' for the disposal of the British Government. It is not necessary to say that section (6) confers on the British Government any interest in property before exercise of the option; it is enough to say that it deprives the owners, to a limited extent, of one of their rights—the right of alienation."

#### **The power of sale withdrawn.**

"The right conferred on the British Government is, no doubt, a novel kind of right; and there is a natural tendency amongst

lawyers to struggle against a right which cannot be placed in any of the known legal categories. But we are dealing with an Act of a Legislature, not with a contract *inter partes* and, although parties cannot by contract create a novel kind of easement, a Legislature which has power to deal with property can create any new qualifications of ownership that it thinks fit. In the present case, the act in substance withdraws from the *fasciculus* of rights of ownership of the stock one of the rights—the right of alienation to any purchaser other than the British Government. It interferes with the rights of property, as in the *Wheat Case*, 20 C.L.R., 54; it does not obstruct or restrict trade or commerce among the States.”

### Reserved Powers of States.

“ Section 92, in forbidding obstructions or restrictions to commerce among the States, is not in any way paramount to section 107 of the same Constitution; both sections are to get full effect. Under section 107 every power of the Queensland Parliament unless exclusively vested in the Commonwealth Parliament or unless withdrawn from the Queensland Parliament—‘ is to continue as at the establishment of the Commonwealth.’ Now, at the establishment of the Commonwealth the Queensland Legislature had power to take away all or any of the rights of ownership as to any subject matter of property; and this power has not been exclusively vested (or vested at all) in the Commonwealth Parliament; and has not been withdrawn from the Queensland Legislature; so that it must continue as in 1900. It is true that if a State law as to property should be inconsistent with a valid law of the Commonwealth Parliament, a law dealing with any of the subjects expressly entrusted to the Commonwealth Parliament, the State law would be invalid ‘ to the extent of the inconsistency ’ (section 109). But there is no such Commonwealth law. It is true also that the power of the State Legislature to make laws obstructing or restricting commerce among the States is ‘ withdrawn ’ from it. But the Act in question does not obstruct or restrict commerce among the States. In my opinion our Parliaments—State and Federal—can make valid laws on their appropriate subjects to the full extent of those subjects; and if the incidental effect of a State, legislating as to property, or of the Commonwealth, legislating as to taxation, were in the one case to reduce inter-state commerce or in the other case to hamper the States in providing its revenue, such a fact would not render the legislation invalid. If the State in the exercise of its power to create,



to destroy, to modify rights of ownership, should sequester a commodity in favour of a person who is not likely to sell across State boundaries, the law of the States is not thereby invalid.

#### The Natural Gas Case.

"In *Oklahoma v. Kansas Natural Gas Co.*, 221 U.S., 229, a Statute of Oklahoma was held to be invalid which prescribed that the natural gas found in that State should not be transmitted by pipes except to points within the State. But the reason is plainly given in the judgment—the State recognized the gas as property in full ownership, without any qualification of the ownership; and the Statute was aimed straight against transmission of the gas to other States, it discriminated against inter-state commerce. The Statute of Oklahoma recognizes the gas to be a subject of *intra-state* commerce, but seeks to prohibit it from being subject of *inter-state* commerce, and this is the purpose of its conversation": 221 U.S., at p. 255.

#### Canadian Precedent.

"In *Attorney-General for Canada v. Attorney-General for Ontario*, (1898) A.C., 700. Canada had exclusive power as to fisheries and Ontario as to property and civil rights; yet, although laws as to the seasons and the instruments for fishing might very seriously affect proprietary rights, might even practically confiscate property. the Canadian laws as to the seasons and the instruments were held to be valid."

"This case has a bearing on an argument which has been used before us, to the effect that if the State Legislatures in Australia can modify rights of property in the manner of this Meat Supply Act, they may practically paralyze the functions of the Federal Parliament. In that case their Lordships said:—"The supreme legislative power in relation to any subject matter is always capable of abuse, but that it is not to be assumed that it will be improperly used; if it is, the only remedy is an appeal to those by whom the Legislature is elected. In other words, the ultimate guarantee of the success of our Constitution is to be found in the general good sense of our people.'": (1898) A.C., at p. 731.

"My conclusion, therefore, is" said Mr. Justice HIGGINS "that as this Queensland Meat Supply Act merely restricts the rights of ownership of stock in Queensland, as its actual operation

is confined to the rights of alienation and of movements irrespective of State boundaries, as it does not place any obstruction or restriction on inter-state commerce although it may incidentally effect it, the Act is a valid exercise of the State's power under section 107 of the Constitution." "The counsel for the State of Queensland have taken the point that section 92 of the Constitution, in prescribing that 'trade, commerce and intercourse among the States . . . shall be absolutely free,' merely forbids these obstructions and restrictions of inter-state trade in the nature of customs duties or other pecuniary charges. I cannot accept this contention. Section 90 made the power of the Federal Parliament exclusive as to customs and excise duties on a certain date, and after that date the laws of the several States on the subject 'cease to have effect'; so that there was no need of section 92 for the mere purpose of ending State customs duties. The words 'absolutely free,' I take to mean that not only State customs duties were to cease (under section 90), but all State prohibitions of imports from other States—and there were such prohibitions; for instance, of grapes—long after the danger of phylloxera had ceased."

"It is urged that if section 92 be treated as applying to more than inter-state duties or charges, the Federal Parliament cannot make any laws as to inter-state trade because the power in section 51 (1) is expressly given 'subject to this Constitution.' But, in the first place, section 92 forbids only laws of obstructing inter-state commerce; whereas laws may also be made facilitating or encouraging inter-state trade as well as obstructing it (section 102 is a qualification of the power to make such encouraging laws); and, in the second place, this tends strongly to support the view that section 92 meant to be a restraint on the States and not on the Commonwealth Parliament. In the United States there is nothing to prevent Congress from imposing border duties between States, nothing in the Constitution to prevent it. But I concur with the Chief Justice in thinking that this matter should be left open." *Per HIGGINS, J. in Duncan v. The State of Queensland*, (1916) 22, C.L.R., at pp. 628-637.

Mr. Justice GAVAN DUFFY and Mr. Justice RICH said:—"We were impressed by Mr. *Mitchell's* contention that section 92 applies only to the imposition of fiscal burdens, but in deference to the unanimous opinion of our brother Judges, the majority of whom were distinguished members of the convention, we shall assume

that it has a wider significance. We shall also assume that it extends to the enactment of State Parliaments so as to invalidate them when they are inconsistent with this provision. What, then, is the meaning of the expression 'trade, commerce and intercourse among the States . . . shall be absolutely free?' "

"Section 51 (1.) of the Constitution enables Parliament to make laws for the peace, order and good government of the Commonwealth with respect to 'trade and commerce with other countries, and among the States.' "

"The words 'absolutely free' in section 92 must, therefore, be subject to some limitation so as to give them a meaning which is consistent with the existence of this legislative power, and the meaning when ascertained must be the same always and in all conceivable circumstances, it must apply equally when we are considering the right of the Commonwealth to legislate under section 51 (1.) and of the States to legislate under section 107."

"No enactment of a State Parliament offends against section 92 unless the object of the enactment, as gathered from its terms, was to forbid or restrain inter-state trade and intercourse."

"If no restraint may be put upon acts which constitute 'trade commerce, and intercourse' or upon persons engaged therein, no law of the State Parliament can stop a burglar flying from one State in order to sell his plunder in another, or exclude a trader seeking to introduce commodities physically or morally poisonous."

"We hold the Queensland Statute to be valid because we think its object is to expropriate such stock and meat as may be found necessary and suitable for the needs of the King's Army, and, in order that a sufficient supply may be obtainable, to keep the whole mass of the commodity in *statu quo* and subject to the accruing needs of that army. The prohibition is not directed against inter-State trade, commerce and intercourse, but against any dealing that may prejudice the King's option to take what he needs for his armies. Apart from section 92 the State Legislatures may intrude into the area of inter-state trade and commerce either with the specific intention of dealing with that subject matter, or in the course of legislating with respect to any other subject matter over which they have control. So far as it is consistent with Commonwealth legislation, their action will be valid; so far as it is

inconsistent with such legislation it will be invalid. Under section 92, it will be invalid though not inconsistent with any Commonwealth legislation. if its real object, as expressed in its language, is to put any restraint whatever on the freedom of 'trade, commerce, and intercourse among the States' but it will not be invalid if that be not its real object." *Per GAVAN DUFFY and RICH, JJ. in Duncan v. The State of Queensland*, 22 C.L.R., at pp. 637-642.

Mr. Justice POWERS said :—"I agree that section 92 was not intended to make trade, commerce and intercourse among the States free from interference by means of the imposition of fiscal burdens only. Such an interpretation of the section would permit any State to pass legislation with the express purpose of prohibiting inter-state trade and commerce. Whether section 92 was intended to bind the Commonwealth as well as the States, it is not now necessary to decide. The acts complained of have been done by a State. The Constitution must be read as a whole, and in my opinion the words 'absolutely free' in section 92 mean free from any restriction not authorized by the Constitution itself—that is, by any express restriction contained in the Constitution, or by the lawful exercise of any power granted to the Commonwealth or retained by the States. Whatever the true construction to be placed on section 92 may be, I hold that no State has the power to prevent trade and commerce among the States in marketable commodities which the owner in any one State is qualified to sell, and is at liberty to sell and dispose of in that State. As my brother HIGGINS puts it 'Whoever has power . . . to sell any specific cattle shall not be obstructed or hindered' by any State from sending them across the border of his State for sale or after sale. There is to be no obstruction or restriction because of State boundaries; State boundaries are to be forgotten for the purpose of 'inter-state trade, commerce or intercourse.'"

"If all the acts authorized by the Queensland Government, and by the circulars and the directions issued by the Chief Secretary and his Under Secretary since the passing of the Act, referred to by my brother ISAACS, could properly be used to show that the Act when passed was substantially an Act to prohibit inter-state trade, the answer of this Court to the first question would probably have been different."

“ The Government officials did notify to the plaintiffs that the fat cattle in question would not be allowed to cross the border of Queensland into another State, but all that was necessary under the Act was to notify the plaintiffs that the cattle were only held by them ‘ for the purposes of and kept for the disposal of His Majesty’s Imperial Government in aid of the supplies for His Majesty’s army in the present war ’ section 6—that His Majesty had the right to take the cattle whenever they were required for those purposes, and that they were prohibited by the Act from selling or dealing with them, forwarding them, or sending them, from the place where they were depastured, except by and under the directions and orders of the Chief Secretary for Queensland. It was also proved that the owners in Queensland of cattle subject to the Act were permitted in the year 1915 to sell, or deal with, or forward their cattle to any part of Queensland ; and that the State Government did prevent cattle—including even dairy cattle which were not included in the Act—being sent across the State borders.”

#### **Abuse of Power not relevant.**

“ The Act in question may have been used for a wrong purpose, but this Court, in deciding whether the Act is valid must ascertain by reference to the words used in the Act itself what Parliament meant in passing the Act.”

“ Neither the abuse of a power nor its consequences, nor any purpose, or motive, or object of the Legislature, not found in the Act, can render the exercise of a legislative power illegal. If the Act contained a proviso that the provisions of sections 6 and 7 (1), (2) and (3) were only to be used to prevent cattle being sent across the Queensland border into South Australia or New South Wales, this Court would, if it followed *Barger’s Case* be justified in holding that the Act was substantially passed to prevent inter-state trade in cattle and not to secure supplies for the Imperial troops, and holding that it was invalid.”

“ It will not be denied that a State could place a tax of £10 on every head of cattle in the State. If it said in the Act that the tax would only be payable on cattle passing or being shipped from the State to another State, the Act would probably be held to be bad because on the face of it in substance it was not for ‘ taxation ’ but in reality to prevent or restrict inter-state trade in cattle. If, however, the Act merely imposed a tax of £10 on all cattle, and

declared that cattle could not be moved or sold by the persons owning them at the time the tax was imposed before payment of the tax, that would prevent inter-state trade in cattle without being a contravention of section 92."

### **An Act to secure Supplies.**

" Looking at the Act itself, I do not find any words in it which show that it is in substance anything more than an Act to secure supplies of Queensland meat for the uses of His Majesty's Imperial Government during the war, to declare the methods of securing those supplies and to provide for payment for any cattle required by His Majesty, with power to extend the operations of the Act to other food supplies and property in Queensland."

### **The Power to Export.**

" It should also be remembered that the Act in question expressly prohibits owners of cattle subject to the Act exporting cattle or meat ; the word ' exporting ' since Federation has been used only with respect to exports beyond the Commonwealth. The State had the power to deal with exports at the date of the establishment of the Commonwealth. That power is not interfered with by section 92. That power continues in the State under the Constitution (section 107) subject to the power of a Federal Parliament to pass a law inconsistent with a State law, in which case the ' law of the Commonwealth shall prevail ' " : (section 109).

### **State Control over Property.**

" In the United States the right to regulate inter-state trade is exclusively vested in Congress, but the United States Constitution does not contain any section similar to section 107 of the Australian Constitution. The power of the States to pass legislation to prevent the manufacture of goods intended for inter-state trade, and to prevent the sale of such goods if manufactured has been upheld by the United States Federal Court in many of the cases referred to during the argument ; but no cases have been quoted or referred to by my brothers BARTON and ISAACS in their judgments in which the rights of the State to pass any law affecting property produced in the States has ever been successfully challenged in the United States Federal Courts. I do not see how section 92 is contravened by the State placing new qualifications or prohibitions on residents in the States, or on property in the States, so long as the property

in the hands of the owners who are qualified to sell and deliver it inter-state is free from interference. Section 92 did not give to persons in all the States under 21 years of age, or to lunatics, a right to sell goods inter-state; if the laws in force in a State rendered them incapable of selling any property at that time, section 92 did not authorize them to sell inter-state. The State law, by disqualifying the persons mentioned, did not place any restriction on inter-state trade or commerce within the meaning of section 92; the State only exercised its power to deal with the rights to property."

### **State Power to Acquire.**

"If the State can compulsorily acquire, or even confiscate property which is admitted, I see no reason why a State cannot place limits on the rights of residents of the State to deal with real or personal property produced in the State; and/or suspend for any time it thinks fit, in the public interest the power to sell any commodity produced in the States. For instance, a State could in my opinion, prevent the sale of any female cattle in the States so as to secure a continuation of the supply of cattle for its people. That would prevent the sale of female cattle to persons in other States, but it would not, I think, be a contravention of section 92."

"Once it is conceded that the States retained the power to deal with the rights of property, the only question left is whether this Act, the Queensland Meat Supply Act, has disqualified the persons resident in Queensland owning cattle fit for export or which may be made available for export from selling or disposing, etc. of their cattle except in a way provided by the Act. I think it has done so very clearly by section 6 (1) and (2) and section 7 (1), (2) and (3). The capacity of disposition is one of the usual incidents of the ownership of property, and is subject to the laws of the State in which the property is situated. The Act deprived the owner of the right or capacity of free disposition. The Act sets aside or dedicates or places in trust for the public purposes—the defence of the State and Empire—the stock and meat referred to in the Act and takes away the power of the then owner to sell except on the terms and conditions set out in the Act. The right of dominion over the property, except under the conditions set out in the Act is taken away. The sections were clearly intended to take away, and did take away any right the then owner had to sell or move

any cattle referred to in the Act, namely, fat cattle or cattle available for export in Queensland, except in accordance with the Act. The Act may, and apparently does, incidentally prevent inter-state trade in cattle to some extent, but that interference is incidental, and is caused by an Act the States can lawfully pass under the powers reserved to the States by section 107 of the Constitution, without contravening section 92." *Per* POWERS, J. in *Duncan v. The State of Queensland*, 22 C.L.R., at pp. 642-652.

Payment to States for five years after uniform Tariffs.

93. During the first five years after the imposition of uniform duties of customs, and thereafter until Parliament otherwise<sup>161</sup> provides—

- (i.) The duties of customs chargeable on goods imported<sup>162</sup> into a State and afterwards passing into another State for consumption, and the duties of excise paid on goods produced or manufactured in a State and afterwards passing into another State for consumption, shall be taken to have been collected not in the former but in the latter State :
- (ii.) Subject to the last subsection, the Commonwealth shall credit<sup>163</sup> revenue, debit expenditure, and pay balances to the several States as prescribed for the period preceding the imposition of uniform duties of customs.

§ 161. "UNTIL PARLIAMENT OTHERWISE PROVIDES."

LEGISLATION.

SURPLUS REVENUE ACT 1908.

This Act repealed the provision made by section 93 of the Constitution in relation to the crediting of revenue, the debiting of expenditure, and the payment of balances to the several States.

The Act was proclaimed to commence on 13th June 1908 ; after that date and until the framing of the Surplus Revenue Act 1910,



the method of crediting and debiting was as follows :—The Commonwealth had to credit to each State—(a) the revenue (other than new revenue) collected therein by the Commonwealth ; and (b) the proportion of the State, according to the number of its people, in the new revenue of the Commonwealth.

The Commonwealth, it was provided, should debit to each State—(a) the expenditure of the Commonwealth incurred solely for the maintenance or continuance, as at the time of transfer of any department transferred from the State to the Commonwealth and (b) the proportion of the State, according to the number of its people, in the other expenditure of the Commonwealth. The Commonwealth should in each month ascertain the balance of revenue over expenditure, and pay that balance to the State as surplus revenue.

New revenue was defined to mean revenue—(I.) received by the department of External Affairs, the Attorney-General's Department, the Department of Home Affairs, and the Department of the Treasury. (II.) received by the Department of Trade and Customs other than duties of customs and excise and revenue arising out of the administration of the laws relating to customs and excise, or out of the administration of State Acts : Provided that any items of revenue which, by reason of their relation to " transferred " expenditure, ought not, in the opinion of the Treasurer, to be credited as new revenue, should not be deemed to be new revenue : Provided further that any items of revenue which, by reason of their relation to " other " expenditure, or by reason of their nature, ought, in the opinion of the Treasurer, to be credited as new revenue, shall be deemed to be new revenue.

All duties of customs paid on goods imported into a State and afterwards passing into another State for consumption, and all duties of excise paid on goods produced or manufactured in a State and afterwards passing into another State for consumption should be taken to have been collected not in the former but in the latter State. All revenue collected by the Commonwealth in one State, but properly appertaining not to that State but to another State, should be taken to have been collected not in the former but in the latter State.

A most important section of the Act was as follows :—All payments to trust accounts, established under the Audit Acts

1901-1906, of moneys appropriated by law for any purpose of the Commonwealth "shall be deemed to be expenditure." Where any trust account had been established under the Audit Acts 1901-1906, and moneys had been appropriated by the Parliament for the purposes of the trust account, or for any purpose for which the trust account was established the appropriation was not to lapse at the close of the financial year for the service of which it was made and the Treasurer could in any year (subject to section 87 of the Constitution) pay to the credit of the trust account, out of the Consolidated Revenue Fund, such moneys as the Governor-General thinks necessary for the purposes of the appropriation.

This Act was superseded by the Surplus Revenue Act 1909, which, in its turn was superseded by the Surplus Revenue Act 1910 which federalized income and expenditure and provided for a subsidy at the rate of 25s. per head of its population being granted to the States for 10 years thereafter.

#### § 162. "GOODS IMPORTED INTO A STATE."

It has been held that in the period between the establishment of the Commonwealth and the imposition of uniform customs duties, the State of Tasmania was not entitled, under the Constitution, to be credited with duties of customs collected by the Commonwealth in the State of Victoria on goods imported into Victoria and passing after the latter date therefrom into the State of Tasmania for consumption. It was held, also, for a similar reason, that the State of Tasmania was not entitled under the Constitution to be credited with duties of excise paid on goods produced in Victoria between the same dates and passing after the latter date therefrom into the State of Tasmania for consumption. Section 93 (1.) of the Constitution applies only to goods imported after the imposition of uniform duties of customs, and not of goods imported before that time: *Tasmania v. The Commonwealth and State of Victoria*, (1903) 1 C.L.R., 330.

#### § 163. "CREDIT REVENUE AND DEBIT EXPENDITURE."

##### **Retiring Pensions and Allowances.**

An officer of a department of the public service of New South Wales who, on the transfer of the department to the Commonwealth, was retained in the service of the Commonwealth, was afterwards called upon to retire under the provisions of section 65 of the Com-

monwealth Public Service Act 1902, and so became entitled by virtue of section 84 of the Constitution to a gratuity calculated in accordance with the scale provided by the New South Wales Public Service Act 1895, section 60, sub-section (II.). It was held by the High Court that the discretion conferred by the New South Wales Act, section 60 (II.), as to the amount of the gratuity was vested in the Governor-General by virtue of section 70 of the Constitution. It was further held that the gratuity, having been paid by the Commonwealth, was expenditure "incurred solely for the maintenance or continuance, as at the time of transfer" of the department, within the meaning of section 89, sub-section (II.) (a) of the Constitution, and was, therefore, by virtue of that sub-section and section 93 of the Constitution, wholly chargeable against the State: *New South Wales v. The Commonwealth*, (1908) 6 C.L.R., 215.

#### Distribution of surplus.

94. After five years from the imposition of uniform duties of customs, the Parliament may provide, on such basis as it deems fair, for the monthly payment to the several States of all surplus<sup>164</sup> revenue of the Commonwealth.

### § 164. "SURPLUS REVENUE."

#### Distribution of Surplus.

The Commonwealth Parliament has authority to appropriate money out of the consolidated revenue for a specific purpose, and money so appropriated, although not yet actually disbursed, is "expenditure" within the meaning of section 89 of the Constitution, and cannot form part of the "surplus revenue" distributable among the States under section 94 until the actual disbursement of it for that purpose is no longer lawful or no longer thought necessary by the Government.

It was therefore held by the High Court that the sums appropriated by the Old-age Pensions Appropriation Act 1908 and the Coast Defence Appropriation Act 1908, were properly deducted from the revenue for the financial year in which the appropriations were made in order to ascertain the "surplus revenue" payable to the States in respect of that year under section 94 of the Constitution and section 4 of Surplus Revenue Act 1908: *New South Wales v. The Commonwealth*, (1908) 7 C.L.R., 179.

This was an action brought in the High Court by the State of New South Wales against the Commonwealth to recover from the defendants the sum of £160,000, which sum the plaintiffs claimed as moneys payable to the State by the Commonwealth as surplus revenues of the Commonwealth for the month of June 1908. On 3rd June 1908 the Treasurer of the Commonwealth, under the provisions of section 62A of the Audit Acts 1901-1906, established a trust account known as the "Harbour and Coastal Defence (Naval) Account" and defined the purpose of such Trust Account to be the payment of the cost of the harbour and coastal defence of the Commonwealth. On 3rd June 1908, the Treasurer under the provisions of section 62A of the Audit Acts 1901-1906, also established a trust account known as the "Invalid and Old-age Pensions Fund," and defined the purpose of such trust account to be the payment of invalid and old-age pensions.

In the month of June 1908, the Parliament of the Commonwealth passed the Coast Defence Appropriation Act 1908, by which the sum of £250,000 was appropriated out of the Consolidated Revenue Fund for the purposes of the aforesaid Harbour and Coastal Defence (Naval) Account. This Act came into force on 10th June 1908. In June 1908 the Parliament of the Commonwealth passed the Old-age Pensions Appropriation Act 1908, by which the sum of £750,000 was appropriated out of the Consolidated Revenue Fund for the purposes of the aforesaid Invalid and Old-age Pensions Fund. This Act came into force on 10th June 1908. In June 1908 the Parliament of the Commonwealth passed the Invalids and Old-age Pensions Act 1908. This Act was assented to by the Governor General in the King's name on 10th June 1908. In June 1908 the Parliament of the Commonwealth passed the Surplus Revenue Act 1908. This Act came into force on 13th June 1908.

In the month of June 1908, after the passing of the aforesaid Acts, the Treasurer, purporting to act under and in accordance with the said Acts, paid to the credit of the Harbour and Coastal Defence (Naval) Account the sum of £250,000, and to the credit of the Invalid and Old-age Pensions Fund the sum of £182,000; and debited these sums against the States on the ground that the same formed portion of the expenditure of the Commonwealth within the meaning of the Surplus Revenue Act 1908. The proportion of these amounts debited to New South Wales was £160,000, and the balance payable and paid to the said State was thereby reduced

by that sum. No payment had at the time of the action been made or, save as aforesaid, authorized, nor had any obligation been incurred to make any payment out of the said sum of £250,000 so appropriated as aforesaid to the said Harbour and Coastal Defence (Naval) Account.

The question for the opinion of the Court was whether the said sum of £160,000 could be lawfully deducted from the balance payable to the State of New South Wales.

The Chief Justice (Sir SAMUEL GRIFFITH) :—" I agree that the word 'surplus' in section 94 must be interpreted with reference to section 89, and that the surplus is the same thing as the aggregate amount of the balances which are required to be returned monthly to the States—no more and no less. The word 'expenditure' does not necessarily mean disbursements actually made, although that is its meaning in some contexts. But, when it is used in a direction as to the mode of making up accounts for the purpose of striking a balance, it may have a wider meaning. The real question for determination is, in my opinion : What is the meaning of the words 'balance' and 'surplus' as used in sections 89 and 94. In a transaction between principal and agent, if the agent were required to pay over monthly to his principal all moneys collected for him after deducting disbursements made on the principal's behalf, I agree that the agent could only bring into account actual disbursements made by him in the course of the month. But, just as in the construction of a specification for a patent it is necessary to ascertain the subject matter and the sense in which the words used would be understood by persons conversant with it, so it is in the construction of a federal Constitution which regulates the relations between the Federal Government and the Governments of the States. These are by no means the same as those of principal and agent. Used in this connection, the word 'surplus' itself connotes some period of time over which the transactions which are to result in a surplus are to extend. The word is one commonly used in relation to public finance, and always as connoting such a period—often called the 'financial year.' This must be so from the nature of the case, since the operations of government are continuous and extend over long periods. The revenue is not collected, nor are disbursements made, in equal amounts from day to day, or from month to month. Thus it must happen that in one month the receipts largely exceed the disbursements, while in another the disbursements exceed the

receipts. The word 'surplus,' used in such a connection, must therefore be read in a sense which recognizes this condition and gives effect to it. And, since the divisible surplus under section 89 is made up of the aggregate of the balances payable month by month to the States, it follows that the balances themselves must be so calculated that the aggregate shall not exceed the amount of the surplus itself. It follows that, until the time has arrived at which the actual surplus is known, the calculation can only be approximate. For these reasons it is impossible to hold that the balances are to be finally struck as of the last day of every month. The plaintiffs rested their whole case upon this contention, which is, in my judgment, untenable. It follows that, if a sum of money is lawfully appropriated out of the Consolidated Revenue for a specific purpose, that sum cannot be regarded as forming part of a surplus until the expenditure of it is no longer lawful or no longer thought necessary by the Government": 7 C.L.R., at pp. 189-191.

Mr. Justice O'CONNOR said:—"It is no doubt the right of the States under section 94 to have returned to them every month all revenue of the Commonwealth which remains after providing for Commonwealth expenditure. But the Commonwealth is entitled in accordance with well-recognized methods of public finance to accumulate revenue to be paid out later in the execution of some Commonwealth power. When moneys are duly appropriated out of the Consolidated Revenue and allotted for such special purpose they may be treated in the ascertainment of surplus revenue as Commonwealth expenditure. But if the moneys are for any reason not expended and go back into the Consolidated Revenue they must again be brought into the account between the Commonwealth and the States, and the debit readjusted. I am, therefore, of opinion that the Commonwealth is entitled under the powers conferred by the Constitution to charge against the States as Commonwealth expenditure the amounts paid out of the Consolidated Revenue under special appropriation into the two funds mentioned in the special case": *id.*, p. 199.

Mr. Justice ISAACS said:—"If the Surplus Revenue Act 1908 is valid the sum of £160,000 claimed by the State of New South Wales has been lawfully deducted by the Commonwealth. That Act cannot in any view of the effect of section 94 of the Constitution be invalid unless it purports to authorize the Commonwealth to deduct that which is 'surplus revenue' within the meaning of section 94.

To determine that point we must go back to section 81 of the Constitution, which I take to be the governing provision upon the question": *id.*, p. 200.

"So long as any purpose of an appropriation remains unfilled but still existent and awaiting performance, it appears to me a hopeless contention that money which stands 'appropriated' for that purpose, and therefore unavailable for any other Commonwealth purpose, is yet money which not only may, but in such circumstances as the present, must, be diverted from the Commonwealth altogether and paid over irrevocably to the States. Such money cannot, as it seems to me, be regarded as 'surplus revenue.' Surplus revenue means free revenue, that is, not marked out by Parliament as required by the Commonwealth for carrying out purposes lawfully resolved upon": 7 C.L.R., at pp. 199-200.

Mr. Justice HIGGINS said:—"In this action the State of New South Wales claims, in effect, that the several States are entitled to receive month by month, from the Commonwealth the whole of the revenue collected by the Commonwealth that has not been actually expended by the Commonwealth—that has not been applied in actual payment by the Commonwealth. If this claim is right, the Commonwealth Parliament has no power to provide out of its revenue in fat months for expenditure which it forsee in the near future—say for naval defence, or for financial assistance to a State (under section 96 of the Constitution); and the power of the Commonwealth Treasurer in making financial arrangements must be grievously crippled. But if such is the meaning of the Constitution, it is our duty to give effect to it": 7 C.L.R., at p. 203.

#### Customs duties of Western Australia.

95. Notwithstanding anything in this Constitution, the Parliament<sup>165</sup> of the State of Western Australia, if that State be an Original State, may, during the first five years after the imposition of uniform duties of customs, impose duties of customs on goods passing into that State and not originally imported from beyond the limits of the Commonwealth; and such duties shall be collected by the Commonwealth.

But any duty so imposed on any goods shall not exceed during the first of such years the duty charge-

able on the goods under the law of Western Australia in force at the imposition of uniform duties, and shall not exceed during the second, third, fourth, and fifth of such years respectively, four-fifths, three-fifths, two-fifths, and one-fifth of such latter duty, and all duties imposed under this section shall cease at the expiration of the fifth year after the imposition of uniform duties.

If at any time during the five years the duty on any goods under this section is higher than the duty imposed by the Commonwealth on the importation of the like goods, then such higher duty shall be collected on the goods when imported into Western Australia from beyond the limits of the Commonwealth.

**§ 165. "PARLIAMENT OF WESTERN AUSTRALIA . . . .  
MAY IMPOSE DUTIES."**

**LEGISLATION.**

**CUSTOMS ACT 1901, Section 169.**

If the Parliament of the State of Western Australia in exercise of the power conferred by the Constitution imposes duties of customs on goods passing into that State, then, whilst such duties are so imposed drawback may be allowed in the State in which import duty has been paid in respect of any such goods as if exported.

In pursuance of the powers conferred by section 95 of the Constitution, the Parliament of Western Australia passed the following Acts :—

Title.	Year and Number.
An Act to impose certain customs duties subject to the provisions of the Commonwealth of Australia Constitution Act.	64 Vict. No. 14.
An Act to impose certain customs duties in accordance with the provisions of the Commonwealth of Australia Constitution Act.	1 Edw. VII. No. 3.

**Inter-State Trade.**

The power of the Legislature of Western Australia under section 95 of the Constitution to tax goods by way of customs



duties was, while it lasted, as unfettered, so far as regards the description of goods to be taxed, as it was before the establishment of the Commonwealth; but the duties, as prescribed by that Legislature did not attach, by virtue of the Western Australia Tariff Act, to goods which are imported from beyond the limits of the Commonwealth. The imposition of duties on foreign goods was within the exclusive authority of the Parliament of the Commonwealth. The third paragraph of section 95 of the Constitution was to be read as a governing enactment qualifying the construction of every Federal Tariff. Its effect was that if the rates imposed by the Western Australian Tariff on any goods of Australian origin were higher than the rates prescribed by the Federal Tariff upon the importation of like goods, that Tariff is to be read in Western Australia as if the higher rate were prescribed by it. The taxation of foreign goods was therefore the Act of Parliament of the Commonwealth, and not of the Parliament of Western Australia. The expression "like goods" in section 95 is merely a term of comparison; it includes such goods of non-Australian origin as are of the same description as the goods mentioned in the Western Australian Tariff, and is not limited to goods of a class which is presently of Australian origin: *Murray & Co. v. Collector of Customs*, (1903) 1 C.L.R., at p. 25.

#### Financial assistance to States.

96. During a period of ten years after the establishment of the Commonwealth and thereafter until the Parliament otherwise provides, the Parliament may grant financial assistance<sup>166</sup> to any State on such terms and conditions as the Parliament thinks fit.

### § 166. "FINANCIAL ASSISTANCE TO THE STATES."

#### LEGISLATION.

SURPLUS REVENUE ACT 1910, Section 5.

THE TASMANIAN GRANT ACT 1912.

THE COMMONWEALTH BUDGET 1913.

#### Western Australia.

Under the provisions of the Surplus Revenue Act 1910, section 5, provision was made that during the period of ten years beginning 1st July 1910, the Commonwealth should pay to the State of Western Australia, by monthly instalments, an annual sum which in

the first year should be £250,000 and in each subsequent year should be progressively diminished by the sum of £10,000. One half of the amount of the payments so made was debited to all the States, including the State of Western Australia, in proportion to the number of their people and the sum so debited to a State was to be deducted by the Commonwealth from any amount payable to the State under the Surplus Revenue Act.

The following amounts have been paid to the State of Western Australia, under section 5 of the Surplus Revenue Act 1910 :—

1910-11	£242,222
1911-12	232,265
1912-13	222,554
1913-14	212,751
1914-15	203,127
1915-16	193,544
1916-17	183,974
1917-18	174,350
Total	£1,664,787

#### Tasmania.

The Tasmanian Grant Act 1912, provided that a sum of £500,000 was to be set aside to be paid to Tasmania by ten annual instalments, commencing at £95,000 and progressively diminishing by £10,000 until £5,000 is reached. By the Commonwealth Budget, 1913, a further sum of £400,000 was allotted to Tasmania to be paid in nine annual instalments, commencing at £5,000 and progressively increasing by £10,000 until the last payment. The result has been Commonwealth grants to Tasmania as follows :—

Financial year 1912-13, £95,000 ; 1913-14, £90,000 ; 1914-15 £90,000 ; 1915-16, £90,000 ; 1916-17, £90,000 ; 1917-18, £90,000—  
Total £545,000.

Payments of £90,000 each financial year will be made to Tasmania until 1920-21 and one of £85,000 for 1921-22.

#### Audit.

97. Until the Parliament otherwise<sup>167</sup> provides, the laws in force in any Colony which has become or becomes a State with respect to the receipt of revenue and the expenditure of money on account of the Govern-

ment of the Colony, and the review and audit of such receipt and expenditure, shall apply to the receipt of revenue and the expenditure of money on account of the Commonwealth in the State in the same manner as if the Commonwealth, or the Government or an officer of the Commonwealth, were mentioned whenever the Colony, or the Government or an officer of the Colony, is mentioned.

**§ 167. "UNTIL PARLIAMENT OTHERWISE PROVIDES."**

**LEGISLATION.**

**AUDIT ACT 1901.**

By this Act the Governor-General was empowered to appoint some person to be Auditor-General of the Commonwealth to hold office during good behaviour. The Auditor-General may appoint State officers or other persons to be his deputies within the States and in that capacity to perform certain powers and functions. The duties of public accountants are defined, provision is made for the collection of public moneys and payment of the same into such bank as the Treasurer may direct, to the credit of the Crown. No money may be drawn from the Commonwealth public account except in the manner provided for in the Act. Provision is made for the audit and inspection of accounts and for presentation of annual reports to Parliament. Separate accounts are to be kept of moneys raised by way of loans and separate accounts for trust funds.

**AMENDING AUDIT ACT 1906.**

This amending Act provides for the appointment of accounting officers instead of public accountants. The "Guarantee Fund" is defined as the Guarantee Fund established for guaranteeing the Commonwealth against loss arising from the fraud or want of fidelity of officers. The Treasurer may permit certain accounts to be paid before being certified. Other clauses relate to unclaimed militia pay, debiting expenditure charged to Treasurer's advance, period for auditing and inspecting accounts, power to dispense with detailed audit in certain special cases, and the Treasurer's quarterly statement of receipt and expenditure. Provision is made for establishing a number of trust accounts—such as the Commonwealth Ammunition Account, the Small Arms Ammunition Account, the

Unclaimed Militia Pay Account, the Naval Agreement Account, the Ocean Mail Account, and others, into which accounts money appropriated by law may be paid and kept until required for distribution and where such money remains without lapsing into the Consolidated Revenue at the end of each financial year.

Trade and commerce includes navigation and State railways.

98. The power of the Parliament to make laws with respect to trade and commerce extends to navigation<sup>168</sup>, and shipping, and to railways the property of any State.

**§ 168. "NAVIGATION AND SHIPPING."**

**LEGISLATION.**

**SEA CARRIAGE OF GOODS ACT 1904.**

See Notes to Constitution, section 51 (1.), Inter-State and External Trade, p. 272.

**SEAMEN'S COMPENSATION ACT 1909-1911.**

See Notes to Constitution, section 51 (1.), Inter-State and External Trade, p. 275.

**NAVIGATION ACT, No. 4 of 1913.**

Reserved 24th December 1912.

Royal assent proclaimed 24th October 1913.

This Act was passed by the Commonwealth Parliament in the exercise of power conferred partly by the Constitution, section 98, and partly under the power conferred on Colonial Parliaments generally by Imperial legislation in the Merchant Shipping Act 1894, sections 102, 264, 280, 444, 478.

**Application of Act.**

This Act is to be read and construed subject to the Constitution, and so as not to exceed the legislative power of the Commonwealth, to the intent that where any enactment thereof, would, but for this sub-section, have been construed as being in excess of that power, it shall nevertheless be a valid enactment to the extent to which it is not in excess of that power : s. 2 (2).

This Act does not apply to any Australian trade ship, limited coast trade ship, or river and bay ship, or her master or crew, unless the ship—

- (a) is engaged in trade or commerce with other countries or among the States ; or
- (b) is on the high seas, or in waters which are used by ships engaged in trade or commerce with other countries or among the States ; or
- (c) is in territorial waters of any territory which is part of the Commonwealth : s. 2 (1).

### **Exemptions.**

This Act does not apply to ships belonging to the King's Navy, or the Navy of the Commonwealth or of any British possession, or to the navy of any foreign government : s. 3.

### **Coastal Trade.**

A ship is deemed to be engaged in the coasting trade, if she takes on board passengers or cargo at any port in a State, or a territory which is part of the Commonwealth, to be carried to, and landed at, any other port in the same State or Territory or in any other State or other such Territory. A ship is not deemed to be engaged in the coasting trade by reason of the fact that she carries passengers who hold through tickets or cargo consigned on a through bill of lading to or from a port beyond Australia and Commonwealth Territories and which is not transhipped to or from any ship trading exclusively in Australian waters : s. 7.

### **Certificated Officers.**

If a ship registered in Australia or engaged in the coasting trade goes to sea without a duly certificated master and officers, according to the scale set out in the Schedule I., or as prescribed, the master and owner of the ship shall be guilty of an offence : s. 14 (1).

Certificates of competency shall be granted in accordance with the Act for each of the following grades of officers :—master ; first mate ; second mate ; engineers—first class, second class, first class coast engineer, second class coast engineer, third class coast engineer : s. 15 (1).

**British Nationality and English Language.**

No person shall engage or go to sea as an officer, in any ship registered in Australia or engaged in the coasting trade, who is not a British subject ; and thoroughly conversant with the English language : s. 26.

**Supplying Seamen.**

No person, other than a superintendent, a seamen's inspector, or the owner, master, mate, or engineer of a ship shall engage or supply a seamen or apprentice to be entered on board the ship : s. 29 (1).

**Apprentices.**

All indentures of apprenticeship to the sea service made in Australia shall be in the prescribed form, and shall be executed by the parties thereto in the presence of a superintendent : s. 34.

**Rating of Seamen.**

A seaman shall not be entitled to the rating of A.B. (an able-bodied seaman) unless he has served at sea for at least three years before the mast or as an apprentice and is eighteen years of age, but employment in limited coast-trade ships under thirty tons shall only count as sea service up to the period of two years of that employment : but any seaman who has been lawfully rated as A.B., before the commencement of this Act continues to be entitled to be so rated : s. 39 (1).

A seaman shall not be entitled to the rating of O.S. (an ordinary seaman) unless he has served at sea for at least one year before the mast or as an apprentice and is seventeen years of age : s. 39 (2).

**The Crew.**

Every ship registered in Australia, and every other ship (British or foreign) engaged in the coasting trade, shall carry as crew the number and description of persons specified in the scales set out in Schedule II., or prescribed, or specified for the ship by the Minister, after advice from the Marine Council to be appointed under the Act : but the Minister may exempt any ships from the operation of this section in regard to boys or apprentices : s. 43.

**The Agreement.**

The master of a ship, other than a limited coast-trade ship of less than fifty tons gross registered tonnage or a river and bay

ship, who engages any seaman in Australia, shall enter into an agreement with him in the prescribed form, in the presence of the superintendent : s. 46 (1).

#### **Obligation as to Seaworthiness.**

In every contract of service, between the owner of a ship and the master, or between the owner or master and any seaman or apprentice, and in every instrument of apprenticeship relating to the sea, there shall be implied, notwithstanding any agreement to the contrary, an obligation on the owner of the ship that the owner and the master, and every agent charged with loading the ship or preparing her for sea or sending her to sea, shall use all reasonable means to ensure the seaworthiness of the ship for the voyage at the time when the voyage begins, and to keep her in seaworthy condition for the voyage during the voyage : s. 59.

#### **Discharge of Seaman.**

When a seaman is discharged from any ship (except a limited coast-trade ship) the master shall sign and give the seaman, in the presence of the superintendent, a discharge in the prescribed form : s. 61 (1).

#### **Seamen's Wages.**

An agreement made in Australia shall not contain any stipulation for the payment in advance, to any seaman or other person, of the wages or any portion thereof. No shipowner, master, or other person, shall pay or agree to pay any wages in advance to or on account of any seaman engaged in Australia : s. 69 (1) (2).

#### **Allotment Notes.**

A seaman engaged in Australia on a foreign-going ship for a voyage calculated to exceed two months may, before the commencement of the voyage, make stipulations, subject to the approval of the superintendent as to terms and conditions, for the allotment, during his absence, by means of an allotment note (a) to his grandparents, parents, wife, brothers, sisters, children, or grand-children, or any of them ; or (b) to a savings bank, or any portion of the wages he may earn on the voyage : s. 70 (1).

#### **Payment of Wages.**

When a seaman is discharged before a superintendent, the master or owner of the ship shall pay his wages through or in the presence of a superintendent : s. 75.

**Account of Wages.**

Every master shall, before discharging a seaman, deliver to him at the time prescribed a full and true account, in the prescribed form, of his wages, and of all deductions to be made therefrom on any account whatever : s. 76 (1).

**Wages and Provisions.**

A seaman's right to wages and provisions shall be taken to begin either at the time at which he commences work, or at the time specified in the agreement for his commencement of work or presence on board, whichever first happens : s. 82.

**Recovering Wages.**

The Supreme Court of any State, and any Court having Admiralty jurisdiction, and any Court having civil jurisdiction in respect of the amount of the claim, shall have jurisdiction to try and determine the following causes :—any claim by or on behalf of a seaman of a ship for wages earned by him on board the ship whether under a special contract or otherwise ; any claim by or on behalf of the master of a ship for wages earned by him on board the ship, and for disbursements made by him on account of the ship : s. 91 (1).

Where any sum not exceeding £50 is due for wages to any seaman or apprentice, he, or a person duly authorized on his behalf may sue for and recover it with costs in a County Court, District Court, or Local Court of a State or a Court of summary jurisdiction : s. 92 (1).

**Discipline.**

Any master, seaman, or apprentice who by wilful breach of duty or by neglect of duty, or by reason of drunkenness (a) does by any act tending to the immediate loss, destruction, or serious damage of the ship or cargo, or tending immediately to endanger the life or limb of a person belonging to or on board the ship ; or (b) fails to do any lawful act proper and requisite to be done by him for preserving the ship or cargo from immediate loss, destruction, or serious damage, or for preserving any person belonging to or on board the ship from immediate danger to life and limb, shall be guilty of an indictable offence : s. 99.

**Bad Provisions or Water.**

If three or more of the crew of a ship consider that their provisions or water are of bad quality, or deficient in quantity, they



may complain thereof to a superintendent, who shall examine the provisions and water or cause them to be examined : s. 116 (1).

On every ship registered in Australia or engaged in the coasting trade in either of the following cases, namely (a) if during a voyage the allowance of any of the provisions required by the prescribed scale is reduced ; or (b) if it is shown that any of the provisions are or have during the voyage been of bad quality, the seaman shall receive compensation for that reduction or bad quality according to the time of its continuance : s. 118 (1).

### **Health.**

The Minister may appoint any person legally qualified as a medical practitioner in any State to be a medical inspector of seamen, and may fix his remuneration. A medical inspector of seamen shall on application by the owner or master of a ship, or by the superintendent, examine any seaman applying for employment or employed in that ship, and give to the superintendent a report under his hand stating whether the seaman is in a fit state for duty at sea, and a copy of the report shall be given to the master or owner : s. 123 (1) (2) (3).

### **Medical Attendance.**

If the master or a seaman or apprentice belonging to a ship receives any hurt or injury or contracts disease in the service of the ship ; or suffers from any illness (not being venereal disease, or an illness due to his own wilful act or default, or to his own misbehaviour), the expense of providing the necessary surgical and medical advice, attendance, and medicine, and also the expense of the maintenance of the master, seaman or apprentice until he is cured, or dies, or is brought or taken back, if shipped in the King's dominions, to the port at which he was shipped, and of his conveyance thither, and in case of death the expense (if any) of his burial, shall be defrayed by the owner of the ship, without any deduction therefore from his wages : s. 127 (1).

### **Accommodation.**

The owner of every steamship registered in Australia, or engaged in the coasting trade, shall make provision to the satisfaction of the medical inspector or the prescribed official for the adequate ventilation of the officers' rooms, engine-room and stokehole : and provide for each officer, up to at least four, a separate room

having a cubic content of not less than one hundred and eighty feet, and having a separate entrance to the deck, and not opening directly into the engine-room ; or in the case of limited coast-trade steamships of less than 300 tons gross registered tonnage, provide for each two officers a separate room, having a cubic content of not less than three hundred and fifty cubic feet, and having a separate entrance to the deck, and not opening directly into the engine-room, or in the case of river and bay ships, provide for the officers such accommodation as is prescribed : s. 135.

Every place in a ship registered in Australia or engaged in the coasting trade, which is appropriated to the berthing accommodation of seamen or apprentices, shall have specified accommodation : s. 136 (1).

#### **Protection of Seamen.**

Any seaman or apprentice may demand permission to go ashore at a convenient time in order to consult a superintendent or justice, or to take legal proceedings against the master or any officer of his ship. No master or officer, knowing that any seaman is desirous of going ashore for any such purpose, shall prevent his going or unreasonably refuse him leave : s. 139 (1) (2).

#### **Property of Deceased Seaman.**

If a seaman or apprentice belonging to any ship, the voyage of which is to terminate in Australia, dies during that voyage, the master of the ship shall take charge of any money and effects belonging to the seaman or apprentice which are on board the ship. The master shall enter in the official log-book the prescribed particulars : s. 150 (1) (3).

#### **Wills of Deceased Seaman.**

Where a deceased seaman or apprentice has left a will, the Minister may refuse to pay or deliver the above-mentioned residue—if the will was made on board ship—to any person claiming under the will, unless the will is in writing, and is signed or acknowledged by the testator in the presence of, and is attested by, the master or first mate or only mate of the ship ; and if the will was not made on board ship—to any person claiming under the will, and not being related to the testator by blood or marriage, unless the will is in writing and is signed or acknowledged by the testator in the presence of and is attested by two witnesses, one of whom is a super-

intendent, or is a minister of religion officiating in the place in which the will is made, or is a justice, or, where there are no such person a British Consul, or officer of customs : s. 157 (1).

#### **Relief to Seamen's Families.**

Where, during the absence of any seaman on a voyage, his wife, or any of his children or step-children, obtains relief from any public institution for the relief of destitute persons in Australia, that institution shall be entitled to be reimbursed, out of the wages of the seaman earned during the voyage, any sums properly expended during his absence in the maintenance of those members of his family, so that the sums do not exceed certain proportions of his wages : s. 161 (1).

#### **The Log.**

An official log in the prescribed form shall be kept in every ship other than a limited coast-trade ship of less than fifty tons gross registered tonnage or a river and bay ship : s. 171 (1).

#### **Foreign Seaman.**

If any foreign seaman is absent from his duty without leave whilst his ship is within Australia, any justice upon complaint on oath may issue his warrant for the apprehension of the seaman, and thereupon may, at the request of the Consul of the country to which the ship belongs, and on proof of the absence without leave, order the seaman to be conveyed on board the ship, or delivered to the master or mate of the ship, or to the owner of the ship or his agent, to be so conveyed : s. 178.

#### **Steam-ships.**

Every steam-ship shall be surveyed once at least in every twelve months by the prescribed surveyor. A surveyor, after making a survey of a steam-ship, shall furnish a report thereof, in the prescribed form, to the Minister : s. 193, s. 194 (1).

#### **Water-tight Partitions.**

All steam-ships registered in Australia or engaged in the coasting trade shall, if required, be divided by water-tight partitions, and have water-tight false bottoms, as prescribed : s. 206 (1).

#### **Unseaworthy Ships.**

A ship shall not be deemed seaworthy under this Act unless she is in a fit state as to condition of hull and equipment, boilers

and machinery, stowage of ballast or cargo, number and qualifications of crew including officers, and in every other respect, to encounter the ordinary perils of the voyage then entered upon ; and she is not overloaded : s. 207.

**Life-saving Appliances.**

The prescribed life-saving appliances shall be carried by ships, and shall be used and kept available for use as prescribed : s. 215 (1).

**Deck and Load Liners.**

Every ship shall be permanently and conspicuously marked with lines, in this Act called deck-lines and load-lines : s. 218 (1).

**Signals of Distress.**

The master of a ship shall not take her to sea unless she is duly furnished with the prescribed signals of distress : s. 228.

**Compasses.**

The compasses of every sea-going ship must, except as prescribed, be properly adjusted by an adjuster of compasses licensed in the prescribed manner : s. 232 (1).

**Boat Drill.**

The master of every ship registered in Australia or engaged in the coasting trade shall exercise his crew in boat drill in such manner, and at such intervals, as are prescribed ; and shall enter full particulars of each drill in his official log-book : s. 235.

**Anchors, Cables, and Gear.**

All anchors and chain cables, exceeding in weight one hundred and sixty-eight pounds, for use on British ships, and all gear used for loading or discharging cargo into or from any British ship registered in Australia or engaged in the coasting trade (whether so used on the ship or not) shall be tested, proved, and marked in the manner prescribed : s. 236.

**Dangerous Goods.**

No person shall send by or carry in any ship any dangerous goods, unless the description of the goods, and the name and address of the sender and consignee, are distinctly marked on the outside of the package containing them ; and notice in writing (in addition to ordinary shipping documents) of the description of the goods has been given to the owner or master of the ship, at or before the time of carrying or sending the goods to be shipped : s. 249.

**Lights and Signals.**

The Governor-General may make rules for the prevention of collisions at sea, and for prescribing what lights and signals are to be used by ships : s. 258 (1).

**Report of Accidents.**

The owner or master of any ship which, during her voyage to any port in Australia, or when within the limits of Australian or the territorial waters thereof has sustained or caused any accident occasioning loss of life or any serious injury to any person ; or has received any damage likely to render her unseaworthy, or her boilers or machinery inefficient, shall report the same within twenty-four hours after the happening of the event, or after her next arrival at any port in Australia, to the person and in the form prescribed : s. 268.

**Passengers.**

The regulations may, in regard to ships engaged in the coasting trade, prescribe any matters or things necessary or convenient for regulating the carriage of passengers generally : s. 270.

**Hospital Accommodation.**

Every foreign-going ship trading regularly with the Commonwealth ; or Australian-trade ship on a voyage between consecutive ports which exceeds a prescribed distance and having 100 persons or more on board, shall be provided with hospital accommodation : s. 271 (1).

**Passengers Wrecked.**

If any ship carrying passengers is wrecked, or is disabled and unable to proceed on her voyage within a reasonable time, whilst on her voyage from one part to another in Australia ; or any ship carrying passengers coming from any port outside Australia is wrecked on the coast of Australia, the owner or master shall cause the passengers to be taken on to their destination, and shall defray their maintenance until so taken on ; if any passenger is tendered and accepts the return of the passage money paid by him, such liability shall cease : s. 272.

**Right of Action by Passenger.**

Nothing in this Part of this Act shall take away or abridge any right of action which may accrue to a passenger in any ship, or to

any other person, in respect of the breach or non-performance of any contract made between or on behalf of the passenger or other person and the master, charterer, or owner of the ship, or his agent : s. 276.

### **The Coasting Trade.**

No ship shall engage in the coasting trade unless licensed to do so : s. 288 (1).

### **Wages.**

Every seaman employed on a ship engaged in any part of the coasting trade shall, subject to any lawful deductions, be entitled to and shall be paid, for the period during which the ship is so engaged, wages at the current rates ruling in Australia for seamen employed in that part of the coasting trade, and may sue for and recover those wages. In the case of ships trading to places beyond Australia, the wages to which a seaman is entitled under this section shall be paid before the departure of the ship from Australia, and the master shall produce to the satisfaction of the Collector at the last port of departure in Australia evidence of their payment : s. 289 (1) (2).

If the seamen employed on any British ship were not engaged in Australia, the master shall, before the ship engages in the coasting trade, make and sign, before a superintendent, a memorandum on the agreement specifying the wages to be paid to the seamen whilst the ship engages in the coasting trade, and that memorandum, when countersigned by a superintendent, shall have effect as an agreement between the master and those seamen : s. 290 (1).

Where under the original agreement a seaman is entitled to paid at a higher rate of wages than the rate ruling in Australia for seamen in a corresponding rating, nothing in this section shall affect his right to such higher rate during the engagement of the ship in the coasting trade : s. 290 (2).

No provision in any agreement, whether made in or out of Australia, shall be taken to limit or prejudice the rights of any seaman under this Part of this Act : s. 291 (1).

An award of the Commonwealth Court of Conciliation and Arbitration which is binding on or applicable to seamen employed in the coasting trade, or a certificate of a Registrar or Deputy Regis-

trar of that Court, certifying what are the rates of wages ruling in Australia for seamen employed in any part of the coasting trade, shall be *prima facie* evidence of those rates of wages : s. 292.

#### **Pilots and Pilotage.**

The Governor-General may proclaim the ports at which the employment of a pilot shall be compulsory. At any such port the pilotage shall be performed by a pilot in the public service of the Commonwealth : s. 330 (1) (2).

#### **Jurisdiction.**

For the purpose of giving jurisdiction under this Act, every offence shall be deemed to have been committed, and every cause of complaint to have arisen, either—(a) in the place in which it actually was committed or arose ; or (b) in any place in which the offender or person complained against is : s. 378.

Where any district within which any Court has jurisdiction is situate on the sea coast, or abuts on or projects into any navigable water, the Court shall have jurisdiction over any vessel being on or lying or passing off that coast, or being in or near that navigable water, and over all persons thereon or belonging thereto, in the same manner as if the vessel or persons were within the limits of the original jurisdiction of the Court : s. 380 (1).

Where any person—(a) being a British subject, is charged with having committed an offence on board a British ship on the high seas or in a foreign port or harbour, or on board a foreign ship to which he does not belong ; or (b) not being a British subject, is charged with having committed an offence on board a British ship on the high seas, and that person is found within the jurisdiction of any Court in Australia which would have had cognizance of the offence if it had been committed on board a British ship within the limits of its ordinary jurisdiction, that Court should have jurisdiction to try the offence as if it had been so committed : s. 381.

Any offence against property or person committed in or at any place either ashore or afloat, out of the King's dominions, by a master, seaman, or apprentice who at the time when the offence is committed is, or within three months previously has been, employed in any British ship, shall be deemed to be an offence of the same nature, and be liable to the same punishment, and be inquired

of, heard, tried, determined, and adjudged, in the same manner and by the same Court and in the same place, as if the offence had been committed within Australia : s. 382.

### **Power to detain Foreign Ship.**

Whenever any injury has, in any part of the world, been caused to any property belonging to the King or the Commonwealth or any State, or to any of His Majesty's subjects, by any foreign ship ; and that any time thereafter that ship is found in any port of Australia or within three miles of the coast thereof, a Justice of the High Court or a Judge of the Supreme Court of a State may, upon being shown to him by any person applying summarily that the injury was probably caused by the misconduct or want of skill of the master or crew of the ship, issue an order directed to any officer of customs or other official named in the order, requiring him to detain the ship until such time as the owner, master, or consignee thereof has—(I.) made satisfaction in respect of the injury, or (II.) given security : s. 383 (1).

### **Australian Flag.**

The red ensign usually worn by British merchant ships defaced as follows, namely :—In the centre of the lower canton next the staff, and pointing direct to the centre of the St. George's Cross in the Union Jack in the upper canton next the staff, a white seven-pointed star, indicating the six federal States of Australia and the Territories of the Commonwealth, and in the fly five smaller white stars, representing the Southern Cross, is hereby declared to be the proper colours for all merchant ships registered in Australia, except in the case of any ship for the time being allowed to wear any other national colours in pursuance of a warrant from the King or from the Admiralty : s. 406.

## **RIVER MURRAY WATERS ACT 1915.**

### **Object of Act.**

The object of this Act was to ratify and provide for carrying out with modifications an agreement entered into between the Prime Minister of the Commonwealth and the Premiers of the States of New South Wales, Victoria and South Australia, respecting the River Murray and Lake Victoria and other waters, and for other purposes.



**Inter-State Agreement.**

The agreement was made in September 1914, between the Prime Minister of the Commonwealth, the Hon. JOSEPH COOK of the first part and the Premier of New South Wales, the Hon. WILLIAM A. HOLMAN on behalf of that State of the second part and the Premier of the State of Victoria, the Hon. Sir A. J. PEACOCK, on behalf of that State of the third part, and the Premier of the State of South Australia, the Hon. ARCHIBALD HENRY PEAKE of the fourth part. By this agreement certain resolutions were adopted with a view to the economical use of the waters of the River Murray and its tributaries for irrigation and navigation and to the reconciling of the interests of the Commonwealth and the riparian States.

**Storage Weirs and Locks.**

The contracting parties agreed to submit such agreement for the ratification of their respective Parliaments. The works provided for under the agreement were as follows :—

- (i.) the provision of a system of storage at Cumberoona or some other suitable site or sites on the Upper River Murray to be approved of by the Commission (hereinafter referred to as the "Upper Murray Storage") :
- (ii.) the provision of a system of storage at Lake Victoria :
- (iii.) the construction of weirs and locks in the course of the River Murray from its mouth to Echuca :
- (iv.) the construction of weirs and locks in the course of the River Murrumbidgee from its junction with the River Murray to Hay, or, alternatively, at the absolute discretion of the Government of New South Wales, to be signified to the Commission within one year from the date on which this agreement comes into effect, the construction of weirs and locks in the River Darling extending up-stream from its junction with the River Murray and involving an equivalent amount of expenditure.

**Works to be constructed.**

All of the works provided for in the next preceding clause to be constructed at points between the mouth of the River Murray and Wentworth shall be constructed by the Government of South

Australia. The works on the River Murrumbidgee or on the River Darling above Wentworth (as the case may be) shall be constructed by the Government of New South Wales. The works on the River Murray above its junction with the River Darling shall be constructed by the Governments of New South Wales and Victoria severally or jointly as may be mutually agreed upon by those Governments or in default of such agreement may be determined by the Commission.

The weirs and locks aforesaid shall be so constructed as to provide at all times of the year for vessels drawing five feet of water.

The construction as provided by this agreement both of the storage works and of the weirs and locks mentioned in clause 20 hereof shall be commenced by the Governments of the several States as soon as may be after this agreement comes into effect and shall be continued without cessation (other than may be due to unavoidable causes) until all of the said storage works and weirs and locks are completed.

#### **Dredging and Snagging.**

After any weir or lock has been constructed under this agreement across or in any river all necessary dredging and snagging up-stream in the river (within the limits indicated by paragraph (iii.) or (iv.) of clause 20 of this agreement) to the distance to which the navigability of the river is effected by such weir or lock, shall be carried out by the Government by which it was constructed.

#### **Government Control.**

The works constructed by any Government under this agreement shall be operated and controlled by such Government; and such Government, in the case of a weir or lock across or in a river the flow of which is regulated under this agreement, shall at all times (subject to clause 51 of this agreement) maintain thereat a depth of water sufficient for navigation by vessels drawing five feet of water and shall also collect any tolls prescribed for the use thereof for purposes of navigation.

#### **Cost of Works.**

The cost of carrying out the works mentioned in clause 20 of

this agreement is estimated at £4,663,000, and shall be borne by the contracting Governments in the following proportions, namely:—

Commonwealth	..	..	£1,000,000
New South Wales	..	..	£1,221,000
Victoria	..	..	£1,221,000
South Australia	..	..	£1,221,000

The estimated cost of the several works mentioned in clause 2<sup>nd</sup> of this agreement and herein more particularly specified is as follows, namely:—

Nine weirs and locks from Blanchetown to Wentworth .. .. . £865,000

Seventeen weirs and locks from Wentworth to Echuca .. .. . £1,700,000

Nine weirs and locks from the junction of the Rivers Murray and Murrumbidgee to Hay, or alternatively locks and weirs from the junction of the River Darling with the River Murray up-stream in the River Darling and involving an equivalent amount of expenditure .. .. . £540,000

Upper Murray Storage .. .. . £1,353,000

Lake Victoria Storage .. .. . £205,000

### **Tolls on Traffic.**

The contracting Government or authority having the control of any lock may, from time to time, demand and receive in respect of vessels carrying freight, passing through such lock, the tolls prescribed by regulations made by the Commission appointed for the purpose of giving effect to the agreement.

### **Inauguration.**

On 31st January 1917, the River Murray Waters Act was brought into operation by the appointment of a Commission consisting of Mr. T. Hill, Deputy Chairman, representing the Commonwealth; Mr. J. S. Dethridge (Victoria); Mr. Dare (New South Wales); and Mr. Eaton (South Australia). One of the principal features of the scheme is a storage revenue of 1,000,000 acre feet capacity to be created by the construction of a dam across the

**Murray-Mitta Mitta Valley** on the Upper Murray above Albury. This work is to be constructed conjointly by the Governments of New South Wales and Victoria.

From the storage dam to Echuca, the river will not be locked, but from Echuca to Blanchetown in South Australia, 26 weirs and locks will be constructed, affording a navigable depth at all times for vessels drawing 5 feet of water. The weirs and locks above Wentworth will be constructed by Victoria and New South Wales jointly, and below Wentworth by South Australia.

The Act enables the construction of locks and weirs in the Murrumbidgee River from its junction with the Murray River to Hay, or, alternatively, for an equivalent expenditure of £540,000 upon locking the Darling River from its junction with the Murray upwards. A system of storage is to be provided in Lake Victoria, to be controlled by South Australia.

The total expenditure involved by the construction of the works covered by the Act is estimated at £4,663,000, of which the Commonwealth Government will contribute £1,000,000, and the three States interested will provide the balance, in equal shares. It is expected that the effect of constructing the River Murray storage scheme will be to secure at all times a sufficient flow of water below Albury to permit of diversions of water for irrigation purposes on both banks of the river; to provide stock and domestic water supply; to make good the losses on the river due to seepage and evaporation and at the same time to give a navigable water-way of nearly 1,000 miles in length.

The Mitta Mitta storage basin which is the fifth largest work of the kind in the world, has been already authorized. A weir and lock across the Murray at Torrumbury, 25 miles by road below Echuca, was officially inaugurated by the turning of the first sod by the Commonwealth Minister of Works, The Hon. L. E. GROOM, M.P., on the 14th June, 1915. Surveys are being made for the construction of a weir and lock near Mildura.

The expenditure on which the Murray Waters Commission has authorized in the last twelve months, amounts to £2,600,000. The total scheme on the original estimates was to have cost £4,663,000, but since the year 1914, the cost of material and labour have increased so considerably that a substantial advance on that estimate, in actual expenditure, must be expected.

## CONTROL OF NAVAL WATERS ACT 1918.

The Governor-General is authorized to define the limits of naval waters in or near which the Commonwealth may have any naval establishment, docks, dockyards, arsenals, wharves, etc. Regulations may be made appropriating mooring places or anchoring ground of vessels having explosives, ammunition, tar, oil, or other combustible substances on board; imposing restrictions and precautions, and provisions for ensuring the proper protection of the vessels, establishments, dockyards, and other property of the Commonwealth, or the vessels of the Royal Navy or the Royal Australian Navy.

**New or Explanatory Power.**

In the case of the *Kalibia Owners v. Wilson*, (1910) 11 C.L.R. 689, opinion was expressed by GRIFFITH, C.J. and O'CONNOR, J., that section 98 of the Constitution does not enlarge the ambit of the trade and commerce powers conferred by section 51 (1.) and that it was merely explanatory of that grant. That case, however, was decided under a Seamen's Compensation Act which applied to the coasting trade, which was held to be invalid.

"Section 98 of the Constitution," said Mr. Justice O'CONNOR "is plainly explanatory only of the trade and commerce powers. It does not, as has been contended, extend them indefinitely with respect to navigation and shipping. I therefore take it as clear that it is not within the power of the Commonwealth Parliament to legislate with respect to the relation of the employer and employee on ships trading entirely within the limits of one State." *Per* O'CONNOR, J. in the *Kalibia Case*, (1910) 11 C.L.R., at p. 707.

In the later case of the *Australian Steamships Ltd. v. Malcolm*. (1915) 19 C.L.R., 298, decided when the High Court was differently constituted and under a new Seamen's Compensation Act limited to inter-state and external trade, it was held by a majority. ISAACS, GAVAN DUFFY, POWERS and RICH, JJ., that section 51 (1.) and section 98 of the Constitution conferred upon the Commonwealth Parliament power to legislate as to navigation and shipping so far as concerns foreign and inter-state traffic, and in particular to regulate the reciprocal rights and obligations of those engaged in carrying on that traffic by means of ships.

**Shipowners' Liability for Accidents to Seamen.**

The ship *Burwah* owned by the Australian Steamships Ltd., left Sydney on the 7th May 1913, on an inter-state voyage. The second mate, W. Malcolm, lost his life at sea on that date by an accident arising, it was conceded, out of and in the course of his employment. His widow brought an action in the District Court, Sydney, against his employers, under the Commonwealth Seamen's Compensation Act 1911, to recover compensation.

It appeared from the evidence that William Malcolm fell overboard from the *Burwah* at a spot which was outside the territorial limits of the Commonwealth, and was drowned. The only material defence was that the Seamen's Compensation Act 1911 was invalid as not being within the powers conferred upon the Federal Parliament under the Commonwealth Constitution. The District Court Judge having given judgment for the plaintiff for £500 the defendants now appeal to the High Court on the ground of the invalidity of the Seamen's Compensation Act 1911.

**Extension of Commerce Power.**

The validity of the Act giving compensation to seamen meeting with accidents arising out of and in the course of their employment, whilst engaged in inter-state or external commerce, was sustained by a majority of the High Court, ISAACS, GAVAN DUFFY, POWERS and RICH, JJ. (GRIFFITH, C.J. and BARTON, J. dissenting).

In delivering judgment, Mr. Justice ISAACS said :—" The trade and commerce power is expressly declared by section 98 to extend to ' navigation and shipping,' which are limited, of course, to inter-state or foreign operations. That in itself, is, in my opinion, an ample basis to support the legislation. As trade and commerce with other countries, and a greater part of mercantile inter-state trade, would in itself necessarily involve carriage by means of ships, it is difficult to see how the declaration of extension to ' navigation and shipping ' has any substantial meaning unless the subject matter of ' navigation and shipping,' so far as concerns foreign and inter-state traffic, is to be included in the ' trade and commerce ' controllable by the Commonwealth. " Continuing His Honor said :—" The test of the contents of the words ' navigation ' and ' shipping ' is what they ordinarily meant in the systems of law in Australia at the time of Federation. The test has several times been applied by this Court, and has the concurrence of the Privy Council

in a similar case (*In re Marriage Legislation in Canada*). The English Merchant Shipping Acts which applied here and the local statute on navigation and shipping ranged over an area which, in principle, includes the matters said to be outside the ambit of power." His Honor referred to the 6th proposition in the *Second Employers' Liability Cases*, 223 U.S., at p. 47, which reads as follows:—"The duties of common carriers in respect of the safety of their employees, while both are engaged in commerce among the States, and the liability of the former for injuries sustained by the latter, while both are so engaged, have a real or substantial relation to such commerce, and therefore are within the range of this power."

"Now it is evident to me," said His Honor, "that to leave outside the sphere of control, with respect to inter-state and foreign trade and commerce, all but the mere act of supply of commodity or service would practically nullify the power. Limiting my observations to present purposes, the class of vehicle to be employed to appliances necessary for safety, the classes of individuals to be employed either in relation to race, language, age or sex, and perhaps to some extent the contractual rights and obligations of the carrier and the public, would all be outside the power. But if not, then it is not easy to see why any modification of common law or statute law affecting the relations of employer and employee, while engaged in co-operating in the trade and commerce, so as to conduct really or substantially to affect the service rendered to passengers or to shippers, is not part of the necessary control of the subject. If, for instance, a physical bar habitually stood on a ship between the sailors and the passengers so as to prevent timely aid in a moment of danger, no one would dispute the right of the Commonwealth Parliament to require its removal. And if the State law—whether common law or statute law—so restricted a sailor's right to compensation in case of accident as to morally but most effectively act upon human nature by deterring him from rendering prompt and ready aid, it would, as I conceive be no less an obstacle to the desired conduct of the trade and commerce placed under Federal control. And if a physical obstacle can be removed, an incorporeal obstacle operating at times even more effectually on human nature may also be removed, and facilities may with equal authority be created": 19 C.L.R., at p. 331.

His Honor went on to say:—"Of course, since the cases sustain concrete legislation which makes negligence the ground of

liability it could not be disputed that so much was within the power of Congress. But I can find no statement of principle that negligence is the limit of legislative power. The inference I would draw from such cases as *Seaboard Air Line v. Horton*, 233 U.S., 492, and *Illinois Central Railroad Company v. Behrens*, 233 U.S., 473, is to the contrary. The power of the Commonwealth Parliament is to regulate a subject and negligence is not that subject. Navigation and shipping in relation to inter-state and foreign commerce is part of the subject. If so, it is impossible to exclude the authority to legislate for compensation merely because it is irrespective of negligence. For negligence full damages are recoverable. For accidental injury the damages are limited—that is, the losses shared. Whether this is prudential or advisable is a matter of Parliamentary discretion, but the root of the matter is now an accepted economic position, and is this: The relations of employers and employees in the actual conduct of inter-state and foreign commerce are the relations of essential, connected and closely related parts of the same mechanism.” : 19 C.L.R., at p. 332.

In concurring with the judgment of the majority of the Court, Mr. Justice POWERS said he did not think it necessary to decide in this case whether the opinion expressed by the High Court in the *Railway Servants' Case* that “general conditions of employment” are not of such a character as to be included within the power of the Commonwealth Parliament to regulate inter-state trade and commerce the effect of them upon that commerce not being direct, substantial and proximate—is sound or not.

Continuing, His Honor said :—“It was contended on behalf of the appellants that the words ‘extends to navigation and shipping’ were surplusage—that the Imperial Parliament had used the words quite unnecessarily and that no additional power was intended to be given or was given to the Commonwealth Parliament by the use of the words. That contention I do not adopt. I agree with the contention put forward by Mr. Leverrier, counsel for the Commonwealth, namely, that the words ‘navigation and shipping’ were used in section 98 to enable the Commonwealth Parliament to do all that could be done by the grant of the power to deal with navigation and shipping in the widest sense, so far as it was part of or used in connection with inter-state commerce. Further I hold that the legislation in question comes within the sixth proposition laid down in *Second Employers' Liability Cases* quoted by my



learned colleagues :—' The duties of common carriers in respect of the safety of their employees, while both are engaged in commerce among the States and the liability of the former for injuries sustained by the latter while both are so engaged, have a real or substantial relation to such commerce and are therefore within the range of this power.' ” *Per* POWERS, J., 19 C.L.R., at pp. 337-340.

Commonwealth not to give preference.

99. The Commonwealth shall not, by any law or regulation of trade, commerce, or revenue, give preference<sup>100</sup> to one State or any part thereof over another State or any part thereof.

### § 169. “PREFERENCE TO ONE STATE.”

#### Exemptions from Federal Excise Tax.

The proviso to section 2 of the Excise Tariff 1906 (No. 16), exempts from taxation goods which are manufactured by any person in any part of the Commonwealth under certain conditions as to the remuneration of labour. These conditions are divided into four categories :—(a), (b), (c), (d). From these conditions it appears that the legislature not only purported to authorize the prescribing of conditions reasonable according to the circumstances of locality, but intended, and indeed prescribed, that discrimination according to locality might be made. Any other rule would be manifestly unjust. Yet this is the thing which, so far as regards liability to taxation, is prohibited by the words under consideration. It was suggested that, though the Act thus authorizes discrimination between States and parts of States, it does not itself discriminate, since, it is said, the conditions actually prescribed by any or all of the specified authorities might in fact be identical throughout the Commonwealth. The legislature may in some cases delegate the power of fixing the incidence of taxation : *Powell v. Apollo Candle Co.*, 10 App. Cas., 282, but it would be a strange thing to hold that, while it cannot itself discriminate between localities, it can, by delegation, confer power to make such discrimination. If different rates had been fixed by the divers authorities, or by the same authority as to different localities, what would be the conditions to be observed by a manufacturer ? Might he claim the benefit of the lowest rate of wages fixed for the time being in any part of the Commonwealth ? If so, every authority would, in effect, have

power to over-rule the decisions of every other authority. It is not conceivable that such a result was intended. It is clear that Parliament cannot by delegation do that which it is forbidden to do directly. It follows that, if there were no other objection to the Act in question, it would be invalid as transgressing the provisions of section 51 (II.) and section 99 of the Constitution : High Court judgment in *The King v. Barger*, (1908) 6 C.L.R., at p. 80.

#### **Different rates of pay in different States.**

In the *Federated Saw Mill Case*, 8 C.L.R., 468, the schedule of wages submitted by the claimants to the employers, and rejected, contained an additional 15 per cent. claimed for the employees in Western Australia, in these words :—" West Australia—15 per cent. to be added on above rates for extra cost of living." The question submitted by the President for the opinion of the High Court was :—" Has the Council and Arbitration Court power to make any enforceable award so far as regards the Western Australian employees ? " An attempt was made to show that the power of awarding, in settlement of the dispute, different rates of wages or other differing conditions of employment would be in violation of section 99 of the Constitution. But the argument was not seriously pressed. It is plain that a direction as to such wages or conditions in an award is not a " law or regulation of trade " or " commerce " giving " preference to one State or any part thereof over another State or any part thereof," and cannot therefore be within the prohibition of that section. *Per O'CONNOR, J.* in the *Federated Saw Mill &c. Employees of Australasia v. James Moore & Son Proprietary Limited*, (1909) C.L.R., at p. 507.

Mr. Justice ISAACS said :—" I should not omit to notice one further contention based on section 99 of the Constitution, viz., that the Act was a regulation of trade and commerce, which gives preference to one State over another. In my opinion it is not a regulation of trade and commerce : see *United States v. E. C. Knight & Co.*, 156 U.S., 1 " : 8 C.L.R., at p. 539.

Nor abridge right to use water.

100. The Commonwealth shall not, by any law or regulation of trade or commerce, abridge the right of a State or of the residents therein to the reasonable use of the waters of rivers<sup>170</sup> for conservation or irrigation.

**§ 170. "RIGHTS OF STATE TO USE WATERS OF RIVERS."****LEGISLATION.****INTER-STATE COMMISSION ACT 1912, Section 17.****River Questions.**

The Commission may investigate all matters affecting the extent of diversions or proposed diversions, or works or proposed works for diversions, from any river and its tributaries, and their effect or probable effect on the navigability of rivers, that by themselves or by their connexion with other waters, constitute highways for inter-state trade and commerce; the maintenance and the improvement of the navigability of such rivers; the abridgment by the Commonwealth by any law or regulation of trade or commerce of the rights of any State or the residents therein to the reasonable use of the waters of rivers for conservation or irrigation; the violation by any State, or by the people of any State, of the rights of any other State, or the people of any other State, with respect to the waters of rivers. In this section "diversions" includes obstructions, impoundings, and appropriations of water that diminish or retard the volume of flow of a river.

**Rights of Commonwealth and State in respect of Inter-State Rivers.**

No recent decision of the Supreme Court of the United States has been a source of greater interest than the case of *Kansas v. Colorado*, 206 U.S., 46. Apart from its importance as a controversy between two sovereign States, it is especially noteworthy on account of the claims put forward on the part of the Federal Government to control an inter-state river.

The State of Kansas brought a suit in the Supreme Court to restrain the State of Colorado from diverting the water of the Arkansas River for the purpose of irrigation of lands in Colorado. It was contended that this artificial diversion diminished the natural and customary flow of the river into and through Kansas. The United States Government filed an intervening petition claiming the right to control the waters of the river to aid in the reclamation of arid lands.

The argument of counsel for the Government was—that the control of such a stream, valuable for irrigation purposes, was necessary for the furtherance of the Government's policy as to irrigation.

This being conceded, the Federal Government would properly have control of such a stream under that provision of the Constitution which gives Congress all the incidental and instrumental powers necessary and proper to carry into execution all the express powers : *Const.*, art. I., sec. 8, cl. 18 ; *Story on Const.*, sec. 1243.

This brought up for the consideration of the Court the question as to whether the right to reclaim arid lands was one of the powers granted to Congress by the Constitution. No proposition of constitutional law is more thoroughly settled than that the Federal Government is a Government of delegated powers. And the right to legislate for the reclamation of arid lands, aside from those the ownership of which is vested in the Federal Government, is not one of the powers expressly delegated to Congress. Counsel for the Government next endeavoured to sustain the right of Congress to legislate for an inter-state stream, which is not navigable, by the doctrine of sovereign and inherent power. This doctrine of inherent power was expressly negatived in *Kansas v. Colorado*.

Mr. Justice BREWER said :—" This natural construction of the original body of the Constitution is made absolutely certain by the Tenth Amendment. This amendment, which was seemingly adopted with prescience of just such a contention as the present, disclosed the wide-spread fear that the National Government might, under the pressure of a supposed general welfare, attempt to exercise powers which had not been granted. It reads :—' The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people.' " The argument of counsel ignores the principal factor in this article, to wit : ' the people.' Its principal purpose was not the distribution of power between the United States and the States, but a reservation to the people of all power not granted. . . . The powers affecting internal affairs of the States not granted to the United States by the Constitution, not prohibited by it to the States are reserved to the States respectively, and all powers of a national character which are not delegated to the National Government by the Constitution are reserved to the people of the United States."

The petition of the Federal Government to be allowed to intervene was disposed of on the ground that the Government had no legal interest in the subject-matter of the suit. On the main ques-

tion the Supreme Court found that the damage done to the State of Kansas by the diversion of the water of the river had not been sufficient to justify the granting of an order restraining the State of Colorado from using the water for irrigation purposes.

Inter-State Commission.

101. There shall be an Inter-State Commission, with such powers of adjudication<sup>171</sup> and administration as the Parliament deems necessary for the execution<sup>172</sup> and maintenance, within the Commonwealth, of the provisions of this Constitution relating to trade and commerce, and of all laws made thereunder.

§ 172. "EXECUTION AND MAINTENANCE."

LEGISLATION.

**Enabling not exclusive power.**

The language of section 101 is somewhat similar to that of section 61, which declares that the executive power of the Commonwealth extends to "the execution and maintenance of this Constitution, and of the laws of the Commonwealth." It has been held that the provisions of section 101 conferring on the Inter-state Commission power of adjudication and administration deemed necessary "for the execution and maintenance of the provisions of the Constitution relating to trade and commerce" are enabling and supplementary to section 51 (I.) and section 61 and do not confer on the Commission any exclusive power.

In the case of *Huddart Parker & Co. Proprietary Ltd. v. Moorhead*, (1909) 8 C.L.R., 331, objection was taken to the validity of section 15B of the Australian Industries Preservation Act which authorizes the Comptroller-General to call upon certain persons and corporations to answer questions as to whether they are engaged in contracts in restraint of trade to the detriment of the public. The ground of the objection was that this legislation vested in the Comptroller-General powers and functions which belong exclusively to the Inter-state Commerce Commission. It was contended that section 101 is in effect an exception from, or proviso to, section 61, so far as relates to the execution and maintenance of laws relating to trade and commerce, and that pending the appointment of the Commission the execution and maintenance of these laws, whatever

that phrase may mean, is in abeyance, just as the right of action by a State against the Commonwealth or another State was in abeyance until the establishment of the High Court. It was pointed out that before the establishment of the Commonwealth great difficulties had arisen in the United States of America with respect to the execution of the trade and commerce laws of that Republic, and that an Inter-state Commission had been created for that purpose. It was also pointed out that the duties to be performed in the execution of such powers are of great complexity, and require the exercise of a fine and impartial discretion. Accordingly, it was said, it was provided by section 103 that the members of the Commission should have a fixed tenure of office so as to be free from political pressure. It was contended that these provisions are inconsistent with the entrusting of the execution and maintenance of the trade and commerce laws to ordinary members of the public service. On the other hand, it was urged that the words of section 101, although in form mandatory, are, from the nature of the case directory only, and that on any other construction any laws which the Parliament might pass as to trade and commerce would be nugatory until the Commission were appointed.

The High Court held that the power of inquiry vested in the Comptroller-General is not an incident of the execution and maintenance of the provisions of the Constitution relating to trade and commerce within the meaning of section 101 of the Constitution, and need not be entrusted to the Inter-state Commission.

Mr. Justice O'CONNOR said :—" It is difficult to see how full effect could be given to the Constitution as a whole by construing section 101, not as an enabling section enlarging the powers conferred by sections 51 and 61, but as a restrictive section, as indicating an intention in the framers of the Constitution that the powers essential for the execution and maintenance of laws relating to trade and commerce should remain in abeyance until the necessary Statutes had been passed for the constitution of an Inter-state Commission. Having regard to these considerations I am of opinion that section 101 is entirely enabling, and that it in no way cuts down the power of the Parliament under sections 51 and 61 to enact such a provision as that now under consideration for the administration and enforcement of laws relating to inter-state trade and commerce " : 8 C.L.R., at p. 376.

Mr. Justice ISAACS said :—" Section 101 is an exceptional constitutional permission to Parliament which is additional and subsidiary. Adjudication is placed on the same footing as administration, and if the contention that section 61 is entirely displaced is sustainable at all, it applies as much to the case of judicial power as to that of administrative power : see section 73 (III.). If for any reason Parliament thought it desirable to invest the Inter-state Commission when created with the duties of inquiry under the Australian Industries Preservation Act, it could certainly do so, but I cannot agree that the only alternative to this is executive paralysis in regard to all the trade and commerce provisions established by the Constitution or enacted by the legislature. And yet that extraordinary position is essential to this branch of the appellants' argument " : 8 C.L.R., at p. 387.

### § 171. " POWERS OF ADJUDICATION."

#### LEGISLATION.

The Inter-state Commission Act 1912, part V., which is headed " Judicial Powers of the Commission," enacts (section 23) that the Commission in the exercise of its powers for the hearing or determination of any complaint, dispute or question or for the adjudication of any matter, shall be a Court of record with power to issue injunctions. Section 24 purports to confer upon the Commission jurisdiction to hear and determine complaints, disputes or questions and to adjudicate upon any matter arising under the Act.

#### Functions of the Commission.

In January 1915, a complaint was lodged with the Commission with respect to the contravention of the provisions of section 92 of the Constitution with relation to inter-state commerce. The complaint was lodged by the Commonwealth against the State of New South Wales and the Inspector-General of the Police. The Farmers and Settler Association of New South Wales intervened. The basis of the complaint was that the Government of New South Wales had seized certain parcels of wheat which were the subject of inter-state trade. This, it was contended, was a breach of the provisions for inter-state freedom of trade contained in section 92 of the Constitution. The answer of the defendant State was that the wheat was, at the time of seizure, the property of the Crown by virtue of the Wheat Acquisition Act 1914, and it was not therefore the subject of inter-state commerce.

This answer raised the question of the power of the New South Wales Parliament to pass the Act in question, and this was the main matter discussed at the hearing.

A preliminary objection was raised on behalf of the defendant State that the Constitution did not justify Parliament in conferring judicial powers on the Commission to ensure the observance of inter-state free trade. The Commission over-ruled the objection, holding that Part V. of the Act was a valid exercise by Parliament of the power contained in section 101 of the Constitution.

After hearing the evidence and the arguments the majority of the Commission consisting of Commissioners GEORGE SWINBURNE, and N. LOCKYER found that the Wheat Acquisition Act was invalid as being an infringement of section 92 of the Constitution; that the acts complained of were also an infringement of that section; and therefore they granted an injunction in the terms asked for and ordered the defendants to pay the plaintiffs' costs. The Chief Commissioner, PIDDINGTON, K.C., dissented, holding that the Wheat Acquisition Act was a valid exercise of the State legislative powers.

From this decision the defendants appealed to the High Court by way of case stated by the Commission under section 43 of the Inter-state Commission Act. The following question, *inter alia*, was submitted for decision:—"Had the Commission jurisdiction to hear and determine the petition to grant the injunction or to make the order for costs?": *The State of New South Wales and the Inspector-General of Police v. The Commonwealth and others*, (1915) 20 C.L.R., 54.

It was held by GRIFFITH, C.J., and ISAACS, POWERS and RICH, JJ. (BARTON and GAVAN DUFFY, JJ. dissenting), that section 101 of the Constitution does not authorize the Parliament of the Commonwealth to constitute the Inter-state Commission a Court, so as to give it judicial powers nor to confer upon it the general power to restrain contraventions of inter-state trading rights, and that, therefore, as the provisions of Part V. of the Inter-State Commission Act 1912 were *ultra vires* the Parliament of the Commonwealth, the Inter-state Commission had no power to deal with the complaint. The decision of the majority of the High Court was that only such powers of adjudication as were incidental to or in aid of administration could be conferred upon the Commission; that



section 101 of the Constitution did not authorize the Federal Parliament to constitute the Inter-state Commission a Court of record to exercise judicial functions ; therefore all the provisions of Part V. of the Inter-state Commission Act 1912, being inseverable, were held to be all *ultra vires* of the Parliament and void. Consequently the Inter-state Commission had no power to issue an injunction restraining the Government of New South Wales from enforcing the Wheat Acquisition Act 1914.

“ In my judgment,” said the Chief Justice (Sir SAMUEL GRIFFITH), “ the functions of the Inter-state Commission contemplated by the Constitution are executive or administrative, and the powers of adjudication intended are such powers of determining questions of fact as may be necessary for the performance of its executive or administrative functions, that is, such powers of adjudication as are incidental and ancillary to those functions. For instance, if a Federal law imposed obligations as to structures or appliances to be used in connection with inter-state railway traffic and entrusted the duty of carrying out those provisions to the Inter-state Commission, it might empower the Commission to determine the question whether in any particular case the provisions of the law had been observed in point of fact, and, if they had not to demolish the structures or forbid the use of appliances contravening the law, and for that purpose to use any necessary force or to invoke the aid of a Court of law to ensure obedience to its order ” : (1915) 20 C.L.R., at p. 64.

“ The dominant words in section 101 ” said Mr. Justice ISAACS, “ are :—‘ the execution and maintenance of the provisions of the Constitution relating to trade and commerce, and of all laws made thereunder ’ ; those words denote the purpose and nature of the power to be conferred on the Commission and mark their limit. Courts of record do not execute or maintain laws relating to trade and commerce. Those words imply a duty to actively watch the observance of those laws, to insist on obedience to their mandates, and to take steps to vindicate them if need be. But a Court has no such active duty : its essential feature as an impartial tribunal would be gone, and the manifest aim and object of the constitutional separation of judicial from ministerial powers would be frustrated. A result so violently opposed to the fundamental structure and scheme of the Constitution requires extremely plain and unequivocal language to accept. This reading of the section does no violence

to any part of the instrument of Government ; on the contrary it harmonizes it. It gives the same effect to the words ' execute and maintain the laws ' in three places where they or like words are found, viz. : section 51 (VL), section 61 and section 101." *Per ISAACS, J.* in the *State of New South Wales v. The Commonwealth*, (1915) 20 C.L.R., at p. 92.

" On the whole," said Mr. Justice ISAACS, " I reject the notion of the Commission as a Court of justice, and regard its *quasi*-judicial powers, where given, as incidental and assistant to its main and paramount purpose, as in the making of some executive order. Its order, subject to any appeal to this Court on law, is taken to be lawfully made and binding, if the necessary judicial powers are given and exercised. But the end must be administrative either by way of order or by way of an application made to a recognized Court to deal with the question in the ordinary exercise of judicial power. I do not see any obstacle whatever to investing the Commission with sufficiently and probably equally effective powers, provided they are created in a proper way. There has not been found any difficulty in arming the American Inter-state Commerce Commission with ample *quasi*-judicial powers, while leaving the body as it may be left an executive organization " : *Per ISAACS, J.*, 20 C.L.R., at p. 94.

Mr. Justice POWERS said :—" I agree with my learned brothers that Part V. of the Inter-state Commission Act 1912 is invalid, although several of the powers vested in the Commission by Part V. could be vested in them by Parliament as a Commission but not as a Court. All the powers set out in Part V. of the Inter-state Commission Act could be given to a properly constituted Federal Court, and the individual members of the Inter-state Commission could be Judges of that Court, with the tenure provided by section 72 of the Constitution for Justices of Courts created by the Commonwealth Parliament."

This decision of the High Court involved the complete breakdown of the Inter-state Commission Act as originally passed by Parliament and it has reduced the status of the Commission itself to that of an ordinary Royal Commission appointed to inquire and recommend. The usefulness of the Commission as contemplated by the framers of the Constitution has been paralyzed.

Two methods of altering the law in order to place the Commission on a proper legal basis have been suggested; one method involving an alteration of the Constitution; the other method not involving any alteration.

The alteration of the Constitution necessary in order to restore to the Commission the powers and functions intended by Parliament would be by amending the Constitution, section 71, giving the Commission a limited right to exercise "judicial power." The other method would be that Parliament should create a Federal Court under the Constitution, section 71, having jurisdiction to maintain the Commerce laws of the Commonwealth, but such Court would have to be composed of members appointed under the good behaviour and life tenure conditions provided by section 72.

Parliament may forbid preferences by State.

102. The Parliament may by any law with respect to trade or commerce forbid, as to railways, any preference<sup>173</sup> or discrimination by any State, or by any authority constituted under a State, if such preference or discrimination is undue and unreasonable, or unjust to any State; due regard being had to the financial responsibilities incurred by any State in connexion with the construction and maintenance of its railways. But no preference or discrimination shall, within the meaning of this section, be taken to be undue and unreasonable, or unjust to any State, unless so adjudged by the Inter-State Commission.

**§ 173. "PARLIAMENT MAY FORBID PREFERENCES OR DISCRIMINATIONS."**

**LEGISLATION.**

INTER-STATE COMMISSION ACT 1912, Sections 18, 19.

**Carrying Rates to be Reasonable.**

All rates fixed or made by any common carrier for any service rendered in respect of inter-state commerce or which affect inter-state commerce, shall be reasonable and just, and every such rate which is unreasonable or unjust is hereby prohibited.

**No undue Preference on State Railways.**

It shall not be lawful for any State, or for any State railway authority, to give or make upon any railway the property of the State, in respect of inter-state commerce, or so as to affect such commerce, any preference or discrimination which is undue and unreasonable, or unjust to any State. In deciding whether a lower charge or difference of treatment constitutes, within the meaning of this section, a preference or discrimination which is undue or unreasonable, or unjust to any State, the Commission shall have due regard to the financial responsibilities incurred by any State in connection with the construction and maintenance of its railways.

Nothing in this Act shall render unlawful any rate for the carriage of goods upon a railway, the property of a State, if the rate is deemed by the Commission to be necessary for the development of the territory of the State, and if the rate applies equally to goods within the State and to goods passing into the State from other States.

**No undue Preference by Common Carriers.**

No common carrier or State authority, other than a State railway authority, shall, in respect of inter-state commerce, or so as to effect such commerce make or give any undue or unreasonable preference or advantage to any particular person, State, locality, or description of traffic; or subject to any particular person, State, locality, or description of traffic to any undue or unreasonable prejudice or disadvantage.

**Proof of Undue Preference.**

Whenever it is shown that any common carrier or State authority, other than a State railway authority, in respect of inter-state commerce or so as to affect such commerce—charges to any person or class of persons or to the persons in any locality or State, lower rates for the same or similar goods, or for the same or similar services, than the carrier or authority charges to other persons or classes of persons, or to the persons in another locality of State; or makes any difference in treatment in respect of any such persons, the burden of proving that the lower rate or difference in treatment is not an undue or unreasonable preference or advantage shall lie on the common carrier or authority.

In deciding whether a lower rate or difference of treatment constitutes an undue preference, the Commission may, as far as it

thinks reasonable, in addition to any other circumstances affecting the case, take into consideration whether the lower rate or difference of treatment is necessary for the purpose of securing, in the interests of the public, the traffic in respect of which it is made and whether the inequality cannot be removed without unduly reducing the rates charged to the complainant.

Commissioners' appointment, tenure, and remuneration.

103. The members of the Inter-State Commission—<sup>174</sup>

- (i.) Shall be appointed by the Governor-General in Council :
- (ii.) Shall hold office for seven years, but may be removed within that time by the Governor-General in Council, on an address from both Houses of the Parliament in the same session praying for such removal on the ground of proved misbehaviour or incapacity :
- (iii.) Shall receive such remuneration as the Parliament may fix ; but such remuneration shall not be diminished during their continuance in office.

§ 174. "INTER-STATE COMMISSION."

LEGISLATION.

INTER-STATE COMMISSION ACT 1912.

**Organization.**

The Commission consists of three members, of whom one must be of experience in the law. It is a body corporate, with perpetual succession and a common seal, and capable of suing and being sued.

The Governor-General is authorized, as soon as conveniently practicable, to appoint three persons to be Commissioners, and on the happening of any vacancy in the office of Commissioner the

Governor-General shall appoint a person to the vacant office. Every such appointment, subject to the Constitution, is to be for a term of seven years ; and every person so appointed is, on the expiration of his term of office, eligible for re-appointment. In case of the illness, suspension, or absence of any Commissioner, the Governor-General may appoint a person to act as a Deputy Commissioner during the illness, suspension or absence, and the deputy, whilst so acting, has all the powers and performs the duties of a Commissioner ;

One of the three Commissioners is to be Chief Commissioner, and on the happening of any vacancy in the office of Chief Commissioner the Governor-General appoints a person to fill that office. In the case of illness, suspension, or absence of the Chief Commissioner, the Governor-General appoints one of the other Commissioners to act as Chief Commissioner during the illness, suspension, or absence.

The Chief Commissioner receives a salary of £2,500 a year, and each of the other Commissioners receives a salary of £2,000 a year. There is also paid to each Commissioner on account of his expenses in travelling to discharge the duties of his office, such sums as are considered reasonable by the Governor-General.

The Governor-General may suspend any Commissioner from office for misbehaviour or incapacity.

A Commissioner who has been suspended is restored to office, unless each House of Parliament within forty days after the statement has been laid before it, and in the same session, passes an address praying for his removal on the grounds of proved misbehaviour or incapacity.

The Commission may hold sittings in any part of the Commonwealth in such place or places as it may deem most convenient for the transaction of its business or proceedings. The Chief Commissioner shall preside as chairman at all meetings of the Commission at which he is present, and in his absence the senior Commissioner present shall preside as Chairman.

For the conduct of business any two Commissioners constitutes a quorum, and have all the powers of the Commission. At a meeting of the Commission the decision of the majority prevails.

The Commission was duly constituted on 11th August 1913 when Messrs. A. B. PIDDINGTON, K.C. (Chief Commissioner), Hon. GEORGE SWINBURNE and N. LOCKYER, I.S.O., were appointed.

*Saving of certain rates.*

104. Nothing in this Constitution shall render unlawful any rate for the carriage of goods upon a railway, the property of a State, if the rate is deemed by the Inter-State Commission to be necessary for the development of the territory of the State, and if the rate applies equally to goods within the State and to goods passing into the State from other States.

*Taking over public debts of States.*

105. The Parliament may take<sup>175</sup> over from the States their public debts [as existing at the establishment of the Commonwealth], or a proportion thereof according to the respective numbers of their people as shown by the latest statistics of the Commonwealth, and may convert, renew, or consolidate such debts, or any part thereof; and the States shall indemnify the Commonwealth in respect of the debts taken over, and thereafter the interest payable in respect of the debts shall be deducted and retained from the portions of the surplus revenue of the Commonwealth payable to the several States, or if such surplus is insufficient, or if there is no surplus, then the deficiency or the whole amount shall be paid by the several States.

**§ 175. "TAKE OVER FROM THE STATES THEIR PUBLIC DEBTS."**

**Constitutional Amendment.**

In 1910 a majority of the people voting in the majority of States affirmed a proposed law for an amendment of the Constitution. section 105, by omitting therefrom the words "as existing at the establishment of the Commonwealth." This removed a limitation

on the Federal power and enables the Federal Parliament to pass laws to take over from the States all their public debts both those contracted before as well as those contracted after the establishment of the Commonwealth.

No attempt has been made to use the power conferred by this section of the Constitution. The public debts of the States have under Federation gone on increasing at an accelerated speed.

### Public Debts of the States before Federation.

The public debts of the several Australian Colonies in the year 1900 (taking the figures as given in Coghlan's Statistics of the Seven Colonies) were as follows :—

Colony.				Public Debt.	Indebtedness per capita.		
				£	£	s.	d.
New South Wales	..	..	..	65,332,993	48	0	0
Victoria	..	..	..	49,324,885	42	4	6
Queensland	..	..	..	34,349,414	70	7	9
South Australia	..	..	..	26,156,180	70	16	5
Western Australia	..	..	..	11,804,178	66	4	11
Tasmania	..	..	..	8,413,694	46	3	1
Total	..	..	..	£195,381,344	£52	2	10

### Public Debts of the States 30th June 1918.

The following return prepared for this work by the Commonwealth Treasury, shows the public debts of the States on 30th June 1918 :—

	Redeemable in London.	Redeemable in Australia.	Total.	Population as at 31st December 1918 per capita.
New South Wales..	£105,648,569	£46,936,124	£152,584,693(b)	79.049
Victoria ..	43,437,719	36,157,927	79,595,646	56.768
		1,626,216(a)	1,626,216(a)	
Queensland ..	50,862,047	12,720,446	63,582,493	91.559
South Australia ..	24,441,397	20,347,269	44,788,666	100.489
Western Australia	30,412,758	11,891,243	42,304,001	134.964
Tasmania ..	9,760,250	5,325,357	15,085,607	73.06
		174,748(a)	174,748(a)	
	£264,562,740	£135,179,330	£399,742,070	



(a) Amount which may apparently be taken over by the Commonwealth being—	
Stock inscribed under the Victorian Municipalities Loans Extension Act	£1,035,24
Certificates given to the Victorian Trust Fund Trustees. (These may be exchanged for Government Bonds, which could be sold)	590,53
Tasmanian debentures issued under Hydro-Electric Loan and Works Act, to be liquidated by half-yearly instalments of principal and interest over a period of 31 years. Interest to be at the rate of 4½ per cent. per annum	146,58
Tasmanian debentures to be issued to the Commonwealth Bank of Australia to replace matured stock issued in substitution for stock formerly standing in the name of Trustees, State Savings Bank, to be liquidated by half-yearly instalments of principal and interest at the rate of £705 per half-year up to 31st July 1927, and £25,479/1/5, in reduction of principal, on 1st January 1928	20,27
	£1,900,96
(b) Includes £7,517,000 raised in 1917-18 towards redemption of loan of £12,648,670 maturing in 1918-1919.	

## CHAPTER V.—THE STATES.

## Saving of Constitution.

106. The Constitution<sup>176</sup> of each State of the Commonwealth shall, subject to this Constitution, continue as at the establishment of the Commonwealth, or as at the admission or establishment of the State, as the case may be, until altered in accordance with the Constitution of the State.

## § 176. "CONSTITUTION OF EACH STATE."

## State Constitutional Powers.

In the Federal Constitution itself we find section 106 declaring that the State Constitutions are to be subject to the Federal Constitution. State powers are to give way to the requirements of the supreme instrument of Government. If the State powers are repugnant to the Constitution then they *pro tanto* cease to exist. If there still exists a State power of legislation it may be exerted but, with the consequence expressed in section 109, that wherever it is found to be inconsistent with the laws of the Commonwealth it is *pro tanto* invalid. The power of legislation controlling the Crown lands of the States remains vested in the States, but the Federal Parliament can tax Crown leaseholds held by private persons to the extent of their interests in such terms. There is a clear distinction between the proprietary rights of an individual and the property of a State. *Per ISAACS, J. in the Attorney-General for the Commonwealth v. The Attorney-General for Queensland, (1915) 20 C.L.R., at pp. 172-175.*

The Queensland Constitution\* provided (see Order in Council of 6th June 1859, clause 15, and Act 18 & 19 Vict. c. 54, Schedule I., section 38), that the commissions of the Judges of the Supreme Court should continue and remain in full force during good behaviour.

In 1867 this provision was repealed, and was re-enacted by section 15 of the Constitution Act of 1867 (Qd.). The Queensland Industrial Arbitration Act, section 6, purported to authorize an appointment of a Judge of the Court of Industrial Arbitration to be a Judge of the Supreme Court so long only as he retained the office of a Judge of the Court of Industrial Arbitration. The Governor-in-Council by a commission, which recited the power conferred by the Industrial Arbitration Act of 1916, purported to appoint the appellant, Thomas Wm. McCawley, Esq., who had previously been appointed President of the Industrial Arbitration Court, to be a Judge of the Supreme Court of Queensland, "to have, hold, exercise and enjoy the said office . . . during good behaviour." It was held by a majority in the High Court that the commission purported to appoint the appellant to be a Judge of the Supreme Court during good behaviour so long only as he retained the office of President of the Court of Industrial Arbitration. Held, further, that the commission was unauthorized by law, and that the appointment was, therefore, wholly invalid.: *McCawley v. The King*, (1918) 26 C.L.R., p. 9.

#### Saving of power of State Parliaments.

107. Every power<sup>177</sup> of the Parliament of a Colony which has become or becomes a State, shall, unless it is by this Constitution exclusively vested in the Parliament of the Commonwealth or withdrawn from the Parliament of the State, continue as at the establishment of the Commonwealth, or as at the admission or establishment of the State, as the case may be.

- § 177. "EVERY POWER OF THE PARLIAMENT OF A COLONY  
 . . . SHALL . . . CONTINUE."

#### Powers of State Parliaments.

In the case of *Deakin v. Webb*, (1904) 1 C.L.R., 585, it was held by the High Court that the salaries of a Minister of the Crown for the Commonwealth and of a member of the Commonwealth Parliament, so far as they are earned in Victoria, are not liable to assessment under the Income Tax Acts of Victoria.

In support of the power of the State to tax the incomes of Federal Ministers, members and officers, it was contended that

section 107 of the Constitution is equivalent to an express re-enactment of the provisions of the State Constitutions, and operates expressly to confer upon the States *de novo* all the powers of legislation which they had, as States, not forming part of the Commonwealth, except those specially mentioned in the Constitution as withdrawn.

The Chief Justice (Sir SAMUEL GRIFFITH) said :—" Section 107 of the Constitution does not purport to confer any new powers. What, then, were the existing powers of taxation possessed by the States ? They included unlimited powers of taxation of all property within the limits of the States, and of all persons who came within the State by its permission. Such a power is an attribute of sovereignty, and extends to all persons to whom the sovereignty itself extends *quoad hoc*. But could such a power have been applied to a person who came within the State, not by the State's permission, but under the direction of a paramount sovereign power, and merely for the purpose of performing duties assigned to him by that paramount power ? For instance, an Admiral of the British Fleet stationed in State waters for the whole or part of a year. In practice, we know that such a power has never been asserted with respect to Governors or Admirals or officers of the Imperial Fleet, and it has not been necessary to inquire into the legal foundation for the admitted exemption. We can find nothing in section 107, or any other provisions of the Constitution, to suggest the existence of such a power. We think that the power, so far as its exercise would interfere with Federal agencies, is a power withdrawn from the States by the Constitution within the meaning of section 107 " : 1 C.L.R., at p. 617.

#### **Trade and Commerce reserved to States.**

The whole of the trade and commerce which begins and ends entirely within the confines of a State is excluded from Federal control. That class of trade and commerce is reserved to the States respectively by section 107 of the Constitution, for it has not been " exclusively," or at all, " vested in the Parliament of the Commonwealth," nor has it been " withdrawn from the Parliament of the State." *Per* BARTON, J. in *Huddart Parker & Co. Proprietary Ltd. v. Moorhead*, (1909) 8 C.L.R., 361.

#### **Domestic Affairs of a State.**

The constitution and regulation of trading corporations are not matters within the area of Federal power, any more than the

private and domestic affairs of individual citizens : *Huddart Parker & Co. Proprietary Ltd. v. Moorhead*, 8 C.L.R., 330. In that case the High Court held that section 51 (xx.) of the Constitution does not confer upon the Commonwealth Parliament power to control the operations of corporations formed under a State law which are lawfully exercising their corporative functions within the limits of a State. The Federal power does not extend to interference with the internal or domestic management of the affairs of such a corporation. It is only when it operates in the Federal area that it becomes a subject of Commonwealth control, and, then only to the same extent as an individual carrying on like operations. *Per GRIFFITH, C.J.* in the *Colonial Sugar Refining Co. Ltd. v. Attorney-General for the Commonwealth*, (1912) 15 C.L.R., at p. 197.

### Police Powers.

Section 107 continues to the States the general power of regulation of internal affairs which in the United States of America is commonly called the "police power," and which was described in the case of *Railroad Co. v. Husen*, 95 U.S., 465, at p. 471. as "a right founded in the sacred law of self-defence."

If there is any apparent conflict between section 92 and section 107 of the Constitution the former must be read in such a sense as will reconcile the conflict. This, it is urged, can be done in accordance with the doctrines laid down in *Russell v. The Queen*, 7 App. Cas., 829. In that case the law under consideration was the Canada Temperance Act 1878, which, wherever it was put in force, would have prohibited the sale of the intoxicating liquors except under certain conditions, and the question was whether that Act was an invasion of the field of "property and civil rights" which was assigned exclusively to the provinces : *The King v. Smithers ; Ex parte Benson*, 16 C.L.R., at p. 106.

The so-called police powers of the Colonies, before the establishment of the Commonwealth, extended to the exclusion of any person whom the Colonial Parliament might think an undesirable immigrant. It is held that the continuance of such a power in its full extent after the federation is inconsistent with the elementary notion of a Commonwealth. "In my opinion," said the Chief Justice, "the former power of the States to exclude any persons whom they might think undesirable inhabitants is cut down to some extent by the mere fact of Federation, entirely irrespective of

the provisions of sections 92 and 117. The extent to which it is cut down and the line of demarcation which should be held to separate a justifiable from an unjustifiable exclusion, may be hard to determine, and yet it may be possible to say on which side of it a particular case lies. In the present case, the offence committed in Victoria by reason of which the applicant was convicted on his coming into New South Wales was "being a person having insufficient lawful means of support," which offence may by the law of Victoria be punished by twelve months' imprisonment. I do not think that the exclusion of an inhabitant of another State for such a reason can be justified on any such ground of necessity as I have referred to. I think that on this application the Court is entitled to go behind the formal words of the Statute attacked, and inquire as to the real reason of the interference with the applicant's freedom of migration from one State to another." *Per GRIFFITH, C.J. in The King v. Smithers; Ex parte Benson*, 16 C.L.R., 109.

### **Control of Waste Lands of the Crown.**

The powers of legislation with respect to the waste lands of the Crown in the Australian Colonies, which by their respective Constitutional Acts, of which the New South Wales Act (1855) 18 & 19 Vict. c. 54, may be taken as an instance, were vested in the Legislature of those Colonies, have not been interfered with by the Constitution of the Commonwealth (1900) and have been expressly continued by section 107. The Commonwealth Land Tax Assessment Act 1914 under which leasehold estates in Crown lands are made liable to land tax does not amount to an attempt to control the administration of Crown land belonging to the State: *Attorney-General (Queensland) v. Attorney-General (Commonwealth)*, (1915) 20 C.L.R., 148.

### **Expropriation of Private Property.**

The argument for the Commonwealth in the *Wheat Acquisition Case* was that the words of the Act authorized the State of New South Wales to acquire the whole of the wheat in the State, and were intended to be used for that purpose, that such an acquisition would have the necessary result of preventing the performance of any existing contracts for the sale of wheat in New South Wales to be exported to another State, and that such a result is a contravention of section 92 of the Constitution, "that trade, commerce and intercourse among the States shall be absolutely free."

"It may be conceded," said the Chief Justice, "that such prevention was a contemplated, if not the necessary, result of the acquisition of all the wheat. This argument, if valid, would, in effect, invalidate any State law couched in general terms for the expropriation of personal property, unless it contained an exception of any such property which might at the time of the attempted exercise of the power be the subject matter of inter-state commerce. In my judgment the well-known case of *Macleod v. Attorney-General for New South Wales*, (1891) A.C., 455, affords a complete answer to this argument. The general power of expropriation of property is a power which is, by the Constitution, neither withdrawn from the States nor exclusively vested in the Commonwealth. By virtue of section 107 of the Constitution, it continues as at the establishment of the Commonwealth. When a State law is enacted in general terms, I do not think that it can be held invalid merely because its language is wide enough to cover cases with which by reason of some provisions of the Constitution it is beyond the competence of Parliament to deal. In such a case I think that, as a matter of construction, the Act should be construed as applying only to matters within the competence of Parliament, just as in the case of a Statute which in its terms includes matters beyond the territorial jurisdiction of the State, unless it appears on the face of the Act that it was intended to deal with matters beyond, as well as with matters within, the competence of Parliament, and that the provisions dealing with both are not severable (*The Kalibia Case*, 11 C.L.R., 689). It follows that in such a case the Statute should be construed as limited in its operations, not that it is invalid altogether": 20 C.L.R., at p. 66.

### **Eminent Domain.**

"The power of the State to expropriate real property by Statute" said BARTON, J. "is, in these days, never questioned. If the power to expropriate personal property is questioned as to any Australian State it can only be because its exercise has been so rare that its novelty rather exposes it to criticism and opposition. But a power newly used is nevertheless a power. The Constitution of New South Wales was at the establishment of the Commonwealth and is now preserved by section 106 of the Federal Constitution, subject to the latter Constitution. The New South Wales Constitution Act empowers the Parliament of that State to make laws for its 'peace, welfare, and good government in all cases whatsoever.' The grant

includes the course of power of expropriation (or eminent domain, if that term is more pleasing) according to the sole judgment of the Parliament of the State on the question of the public welfare. In some of the States of the American Union the power of expropriation is limited by their Constitutions to acquisition on just terms. So in our Federal Constitution not only must the terms be just, but the power is limited to the purposes in respect of which the Parliament has power to make laws : Constitution, sec. 51, sub-sec. (xxxI). Whether there is or is not in that instance a power of eminent domain also, I do not discuss now. But the power to make laws is unlimited in New South Wales save by territorial jurisdiction, and, since January 1901, by the Federal Constitution in some respects." *Per* BARTON, J. in *The State of New South Wales v. The Commonwealth*, (1915) 20 C.L.R., at pp. 77-78.

"The Wheat Acquisition Act of New South Wales is not primarily an interference with inter-state trade or commerce at all ; it is an exercise of a legislative power declared by section 107 of the Constitution to remain in the Legislature of New South Wales for the purpose of managing its own internal affairs. *Per* GAVAN DUFFY, J., 20 C.L.R., at p. 105.

"I also agree that the State of New South Wales had power to acquire any property in the State and, after acquisition, to exercise the right of an owner to decide whether its property is to remain in the State or to be a subject of inter-state commerce. Section 92 of the Constitution does not affect that right. The New South Wales Wheat Act can reasonably be, and ought, if possible to be construed, as referring only to matters within the jurisdiction of State Parliament. I agree that the New South Wales Wheat Act in question is valid and that the Commonwealth action fails." *Per* POWERS, J., 20 C.L.R., at p. 107.

### **State Power over Property.**

Section 92 of the Constitution, in forbidding obstructions or restrictions to commerce among the States, is not in any way paramount to section 107 of the same Constitution ; both sections are to get full effect. Under section 107 every original State power—unless exclusively vested in the Commonwealth Parliament or unless withdrawn from the States is to "continue as at the establishment of the Commonwealth." Now, at the establishment of the Commonwealth the State Legislatures had power to take away



all or any of the rights of ownership of property. This power has not been exclusively vested in the Commonwealth Parliament, and has not been withdrawn from the States; so that it must continue as in 1900. It is true that if a State law as to property should be inconsistent with a valid law of the Commonwealth Parliament a law dealing with any of the objects expressly entrusted to the Commonwealth Parliament, the State law would be invalid "to the extent of the inconsistency" (section 109). "But" said Mr. Justice HIGGINS, "there is no such Commonwealth law. It is true also that the power of a State Legislature to make laws obstructing or restricting commerce among the States is 'withdrawn' from it: but the Queensland Meat Act does not obstruct or restrict commerce among the States." *Per* HIGGINS, J. in *Duncan v. State of Queensland*, 22 C.L.R., at p. 631.

"The Parliaments of the States, at the establishment of the Commonwealth, had the power to authorize the Crown to acquire any property or any interest in property with or without paying compensation. They had the power to tax the property of residents in the States to any extent they thought fit. They had the power to say who should or should not be qualified to hold real or personal estate, and who should or should not be able to sell it. They had the power to say on what conditions property could be held or used, they had the power to prevent any owner of cattle from removing cattle from his holding without the consent of an officer of the Government. None of those powers have been exclusively vested in the Parliament of the Commonwealth or withdrawn from the States, and hence those powers can still be exercised by a State even if the effect of the exercise does incidentally hinder or prevent some inter-state trade or commerce. "The framers of the Constitution," said Mr. Justice POWERS, "apparently did not anticipate or think it necessary to prevent, the exercise of the sovereign powers of the State being used to the extent that they have been in the direction of socialism or of the State acquisition and control of marketable commodities. The High Court held in the *Wheat Case*, 20 C.L.R., 54, that the State of New South Wales could compulsorily acquire all the marketable wheat in New South Wales, although a large portion of it, prior to the compulsory acquisition, was admittedly intended for inter-state trade and commerce. The change of ownership did not prevent inter-state trade or commerce merely because the new owner (the State) did not wish to engage in inter-state trade or commerce. Inter-state trade was just as free to

all owners of property who desired to engage in such trade or commerce and were capable of doing so. The State of South Australia is dependent altogether on the State of New South Wales for its coal supplies. Victoria is to a great extent dependent on New South Wales for its coal. All the other States import some New South Wales coal, and the shipping companies (except in the State of Queensland) depend almost wholly on New South Wales coal. It is a marketable commodity, and the greater part of the coal raised on New South Wales is used for inter-state purposes. "Yet the State of New South Wales can legislate as to all mines in the State. It could make labour conditions so oppressive that it would prevent the owners working a coal mine; it could order all employers to pay their employees a £1 a day for six hours work on 6 days a week, and in that way prevent many of the mines being worked at all; it could tax all coal raised to such an extent that it would be unprofitable to work the mines. It is admitted that it could acquire all the mines, or all the coal as it is raised; and in all the ways mentioned prevent or interfere with inter-state trade without any contravention of section 92. The power of the State to pass any legislation necessary to protect the health or safety of the people of the State has never been questioned, however seriously the exercise of the power may incidentally affect inter-state commerce or even if it prohibits it." *Per POWERS, J. in Duncan v. The State of Queensland*, (1916) 22 C.L.R., at p. 150.

Saving of State laws.

108. Every law<sup>178</sup> in force in a Colony which has become or becomes a State, and relating to any matter within the powers of the Parliament of the Commonwealth, shall, subject to this Constitution, continue in force in the State; and, until provision is made in that behalf by the Parliament of the Commonwealth, the Parliament of the State shall have such powers of alteration and of repeal in respect of any such law as the Parliament of the Colony had until the Colony became a State.

§ 178. "EVERY LAW IN FORCE IN A COLONY SHALL  
CONTINUE."

**Municipal Rate Law.**

Pre-Federation State laws imposing municipal rates on State Government lands and buildings which, after the establishment of

the Commonwealth, become vested in the Commonwealth are not continued in force by section 108 of the Constitution. By section 114 of the Constitution the Commonwealth is not liable to pay rates in respect of such property : *The Municipal Council of Sydney v. The Commonwealth*, (1904) 1 C.L.R., at p. 208.

### Imperial and State Law.

.The expression "every law in force in the State" is sufficient to include not only every State law in force at the time of Federation but every Imperial Act applicable to the State. In *McKee v. Meagher* it was contended that the administration of the Fugitive Offenders Act 1881 was not a law in force in Victoria, at the time of the establishment of the Commonwealth, within the meaning of section 108 of the Constitution. The Chief Justice (Sir SAMUEL GRIFFITH) said :—"I can see no force in that contention. Amongst the powers possessed by the Governor, the Judges, and the magistrates of Victoria were powers under the Fugitive Offenders Act 1881, and the law which enabled them to exercise those powers was a law in force in Victoria, and, in my opinion, still continues a law there" : (1906) 4 C.L.R., at p. 297.

### Inconsistency of laws.

109. When a law of a State is inconsistent<sup>179</sup> with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.

### § 179. "A LAW OF A STATE INCONSISTENT."

#### Concurrent Powers.

"It must" said the Chief Justice, "be taken to be of the essence of the Constitution that the Commonwealth is entitled, within the ambit of its authority, to exercise its legislative powers in absolute freedom, and without any interference whatever except that prescribed by the Constitution itself. There is, however, a large class of cases with respect to which a similar power is for a time reserved to the States. In these matters there is, consequently a possibility of conflicting legislation. This contingency is provided for by section 109 of the Constitution, which declares that when a

law of a State is inconsistent with a law of the Commonwealth the latter shall prevail, and the former shall to the extent of the inconsistency be invalid. With respect, however, to matters within the exclusive competence of the Federal Parliament no question of conflict can arise, inasmuch as from the point at which the quality of exclusiveness attaches to the Federal power the competency of the State is altogether extinguished. It follows that when a State attempts to give to its legislative authority an operation which, if valid, would fetter control, or interfere with, the free exercise of the legislative power of the Commonwealth, the attempt unless expressly authorized by the Constitution, is to that extent invalid and inoperative." *Per* GRIFFITH, C.J. in *D'Emden v. Pedder*, (1904) 1 C.L.R., at p. 110.

"In our judgment the provisions of section 109 have no application to the present controversy (State and Federal instrumentalities) but were enacted for a different purpose. They apply to matters which, upon the face of them, are within the common ambit of power of both Commonwealth and State Legislatures, but do not apply either to State legislation or to Commonwealth legislation, where either would, if valid, be inconsistent with the express or implied provisions of the Constitution itself. In other words section 109 only applies in cases of concurrent legislative jurisdiction." *Per* GRIFFITH, C.J. in *Baxter v. Commissioner of Taxes, New South Wales*, (1907) 4 C.L.R., at p. 1129.

#### **When Federal Law prevails.**

"Section 109 of the Constitution itself is explicit. The true way to test the argument in the present case is to ask whether the Federal Act would be valid supposing the State Act were non-existent. If it would, then, in case of inconsistency the State law, whatever it may be, under whatsoever power it is enacted, on whatsoever subject, must to the extent of the inconsistency be invalid. This constitutional provision is essential to the very life of the Commonwealth; a decision in favour of the respondents on this point destroys the supremacy of Federal law, which alone has held the American union intact, has preserved the character of the Canadian Dominion, and can uphold the Australian Constitution." *Per* ISAACS, J. in the *Federated Saw Mill &c. Employees of Australasia v. James Moore & Son Proprietary Ltd.*, (1909) 8 C.L.R., at p. 530.

**Judicial "Awards" and "laws" distinguished.**

In the *Whybrow Special Case*, (1910) 10 C.L.R., 292, the question was raised whether an award by the Commonwealth Conciliation and Arbitration Court would, in case of inconsistency, prevail over the determination of a wages board empowered by a State Statute law to fix a minimum rate of wages.

The Chief Justice (Sir SAMUEL GRIFFITH) said :—" The notion of any one person or set of persons being set up in a civilized country with authority to supersede or abrogate any law of which he does not approve is to me so extraordinary that I can hardly conceive of any Legislature in full possession of its faculties setting up such an institution. If they did, to call such a process arbitration would be an irony not to be expected in a charter of government. Still less can I conceive of a number of sovereign States agreeing to a federation in which such a dispensing power might be conferred, not even upon the Federal Legislature, but upon an individual or individuals. But it is gravely said that the Constitution has done so. I think that very plain words would be necessary to bring about such a result. It certainly cannot be based upon the argument *ab inconvenienti*, which, indeed, tends wholly in the other direction. If the argument were accepted, the whole of the State laws regulating domestic industry, and a great part of the police laws, the need for which depends upon local circumstances of which the State Legislatures are the natural and appointed judges would be subject to the review of one or more individuals, who, unless endowed with more than human knowledge and wisdom, would be unable to discharge ' the function of so mighty an office ' " : 10 C.L.R., at p. 284.

Mr. Justice BARTON said :—" In the case of *Huddart Parker & Co. Ltd. v. Moorhead*, 8 C.L.R., 330, we were examining into the validity of some Federal enactments which assumed to regulate not merely external and inter-state trade, but also that trade which is confined within the limits of a State, and is reserved to the States as a subject of legislation ; in that connection it was necessary to consider whether the power given by sub-section (xx.) of section 51 constituted an exception to this otherwise exclusive reservation to the States. Here the question is whether sub-section (xxxv.) constitutes an exception to the otherwise exclusive reservation to the States of a branch of their police power, namely, the power to

deal by legislation with their industrial affairs. The majority of this Court held there that any power must, in order to constitute the exception contended for, be couched in clear and unambiguous terms. In taking this view we held to that expressed by the Chief Justice, with whom my brother O'CONNOR, J., and I were in agreement in the *Union Label Case* (*Attorney-General for New South Wales v. Brewery Employees' Union of New South Wales*), 6 C.L.R., 469, at p. 503, as follows:—' In my opinion, it should be regarded as a fundamental rule in the construction of the Constitution that when the intention to reserve any subject matter to the States to the exclusion of the Commonwealth clearly appears, no exception from that reservation can be admitted which is not expressed in clear and unequivocal words. Otherwise the Constitution will be made to contradict itself, which upon a proper construction must be impossible '": 10 C.L.R., at p. 292.

Mr. Justice O'CONNOR said:—" The principles on which Statute is compared with Statute have no bearing upon the question whether a Commonwealth industrial award can or cannot stand against a State Statute. Within the field of Commonwealth power no State Statute can stand in the way of Commonwealth legislation. But outside that field the Commonwealth tribunal must obey the State law. The question of inconsistency, in the sense in which the words are used in the American decisions to which I have referred, cannot arise in cases where the Commonwealth industrial award is to be contrasted with the State Statute law to which it must conform ": (1910) 10 C.L.R., p. 306.

### Competition of Federal and State Laws.

The moment we depart from the clear terms of section 109 of the Constitution, there is nothing but chaos. Section 109 and covering clause (v.) form the keystone of the Federal structure. and if they are once loosened, Australian union is but a name, and will reside chiefly in the pious aspirations for unity contained in the preamble to the Constitution. Section 109 is not found in the American Constitution. But its additional insertion in our Constitution emphasizes the supremacy of Commonwealth laws. It is needless to say that to bring section 109 into operation the two competing laws must meet on the same field. If they are not on the same field they cannot collide; they cannot be inconsistent. They may be on the same field and yet not inconsistent, and in that

case both are valid; but if inconsistent, they must necessarily meet on the same field though enacted under widely differing powers. One must necessarily prevail, the only question being which. For answer there is only one source of direct authority, the Constitution, clause V., and section 109. *Per* ISAACS, J., in the *Federated Saw Mill &c. Employees of Australasia v. James Moore & Son Proprietary Ltd.*, (1909) 8 C.L.R., 535-6.

Provisions referring to Governor.

110. The provisions of this Constitution relating to the Governor of a State extend and apply to the Governor for the time being of the State, or other chief executive officer or administrator of the government of the State.

State may surrender territory.

111. The Parliament of a State may surrender any part of the State to the Commonwealth; and upon such surrender, and the acceptance thereof by the Commonwealth, such part of the State shall become subject to the exclusive jurisdiction of the Commonwealth.

States may levy charges for inspection laws.

112. After uniform duties of customs have been imposed, a State may levy on imports or exports, or on goods passing into or out of the State, such charges as may be necessary for executing the inspection<sup>180</sup> laws of the State; but the net produce of all charges so levied shall be for the use of the Commonwealth; and any such inspection laws may be annulled by the Parliament of the Commonwealth.

### § 180. "INSPECTION LAWS."

#### Meaning of.

The object of inspection laws is to improve the quality of articles produced by the labour of a country; to fit them for exportation; or, it may be, for domestic use. They act upon the subject before it becomes an article of foreign commerce, or of commerce among the States. *Per* MARSHALL, C.J., in *Gibbons v. Ogden*, 9 Wheat., at p. 203.

"Section 92 of the Constitution must, on any construction, include a prohibition of inter-state customs duties and the like, and section 112 plainly reads as authorizing the imposition by a State of certain charges which are not within the prohibition. Section 112 clearly recognizes State inspection laws as outside the prohibition. But if any attempt is made to convert them into instruments for the fettering of inter-state commerce, the deterrent provisos that the net produce of inspection charges shall be for the use of the Commonwealth, and that the Parliament of the Commonwealth may annul such laws altogether, afford two effective safeguards. The truth is that, whether the charges are made on goods inspected as they pass into or out of the State, they are not taxes but merely compensation for services rendered": *Per* BARTON, J., in *Duncan v. State of Queensland*, (1916) 22 C.L.R., at p. 588.

"Inspection being a proper subject of State legislation, section 112 merely makes it clear that the States may make charges for that service even at the ports and boundaries. That is merely a question of the most convenient place at which to perform the service. There were, at the time of the adoption of the Constitution of the United States, numerous laws of this class existent in the several States. There were similar laws in the Australian Colonies at the times of federation, and their number has probably increased since. Instances are to be found in the laws for the inspection and grading of butter, an operation usually conducted at the ports before shipment. The charges referred to in section 112 are those imposed for such a service. Neither the laws nor the charges for the service rendered are in any sense regulations of external or inter-state trade, though they may have some remote influence on the one or the other": *Per* BARTON, J., in *Duncan v. State of Queensland*, (1916) 22 C.L.R., at p. 589.

### **What they Connote.**

"As to the argument based by counsel on section 112, that by assuming inspection laws to be valid, and by expressly conferring the power to impose inter-state inspection charges, the Convention did not mean by section 92 to do more than forbid inter-state duties—I cannot accept it. It seems to me to be a fundamental error to suppose that inspection laws necessarily connote any obstruction or restriction on inter-state movement. They may obstruct or restrict and therefore the Federal Parliament has power



to annul them ; but inspection laws can be of many varieties ; and in assuming that they may be valid, section 112 does not exclude them from the operation of section 92 so far as they restrict interstate commerce " : *Per* HIGGINS, in *Duncan v. The State of Queensland*, (1916) 22 C.L.R., at p. 637.

#### Intoxicating liquids.

113. All fermented, distilled, or other intoxicating<sup>181</sup> liquids passing into any State or remaining therein for use, consumption, sale, or storage, shall be subject to the laws of the State as if such liquids had been produced in the State.

See vol. I., pp. 944-8.

#### § 181. "INTOXICATING LIQUIDS."

##### The Wilson Act.

The history of the derivation of this section from the Wilson Act of the United States was recapitulated by Mr. Justice BARTON in *Fox v. Robbins*, 8 C.L.R., at pp. 124-5. His Honor went on to say :—" Now, on comparing the Wilson Act with section 113 of our Constitution, it will be seen that they are identical in substance and nearly identical in terms. It was simply thought safer by those who framed our Constitution, especially in view of the inflexible character of section 92, that such a provision should be embodied in the charter than that it should be left for future enactment by the Federal Parliament under the commerce power. The Australian provision is shorter than the American Act."

##### Discriminating Laws.

The unanimous decision of the Court in *Fox v. Robbins*, was that a West Australian law which required a greater fee for a licence to sell wine made from grapes grown in other States than for a licence to sell wine made from West Australian grapes was—at least to the extent of the difference between the fees—invalid as a burden on inter-state commerce contrary to section 92 of the Constitution, and could not be supported by section 113. Mr. Justice BARTON said :—" Like the Wilson Act, then, section 113 has the effect of enabling State laws, otherwise valid, to take effect on the liquors introduced from other States, at least as soon as they have reached the consignee, whether the original packages have been

broken or opened or not. It has no greater effect, and there is no word in it which says, or which gives room for the implication, that it is meant to justify a violation of section 92 by way of discrimination. Any law of the State laying any burden on the liquor brought in, whether by tax or import, or by restriction of sale, must apply equally to the like article of the States' own production, or section 113 will not save the law": 8 C.L.R., at p. 125.

"Section 113 of the Constitution gives a State power to legislate with respect to intoxicating liquids imported into the State as fully as with respect to intoxicating liquids produced in the State, but does not authorize a discrimination between imported intoxicating liquids and those produced in State adverse to the former." *Per* HIGGINS, J. in *Fox v. Robbins*, 8 C.L.R., at p. 131.

States may not raise forces. Taxation of property of Commonwealth or State.

114. A State shall not, without the consent of the Parliament of the Commonwealth, raise or maintain any naval or military force, or impose any tax<sup>182</sup> on property of any kind belonging to the Commonwealth, nor shall the Commonwealth<sup>183</sup> impose any tax on property of any kind belonging to a State.

**§ 182. "STATE SHALL NOT . . . IMPOSE ANY TAX  
 . . . ON COMMONWEALTH PROPERTY."**

**Municipal Rates.**

Upon the establishment of the Commonwealth, and, subsequently, certain lands and buildings within the boundaries of the City of Sydney, the property of the Government of New South Wales, became vested in the Commonwealth by virtue of sections 85 (1.) and 86 of the Constitution. Before the establishment of the Commonwealth these lands and buildings, as Crown lands in New South Wales, were liable to be rated, and were rated by the plaintiff Council under the Sydney Corporation Act of 1879, and the Sydney Corporation (Consolidating Act) of 1902. After the vesting of the lands and buildings in the Commonwealth, the plaintiff Council claimed to be entitled to be paid rates thereon by the Commonwealth. It was held by the High Court that the liability of the lands and buildings to be rated was not continued by section 108 of the Constitution, and that, therefore, by virtue of section

114, the Commonwealth was not liable to pay rates in respect of them: *The Municipal Council of Sydney v. The Commonwealth*. (1904) 1 C.L.R., 209.

Mr. Justice BARTON said:—"Holding the view that the 'imposition' of taxation with which we are at present concerned has taken place since Federation, I consider also that, apart from the express prohibition of section 114, the arguments of MARSHALL, C.J. in *McCulloch v. Maryland*, could, if necessary, be urged with much force in this case. At any rate, I venture for myself to adopt the statement and the reason of Mr. Justice FIELD, in the passages cited at the outset of my opinion": 1 C.L.R., at p. 209. "It is familiar law that a State has no power to tax the property of the United States within its limits. This exemption of their property from State taxation—and by State taxation we mean any taxation by authority of the State, whether it be strictly for State purposes or for mere local and special objects—is founded upon that principle which inheres in every independent government, that it must be free from any such interference of another Government as may tend to destroy its powers or impair their efficiency. If the property of the United States could be subjected to taxation by the States, the object and extent of the taxation would be subject to the State's discretion. It might extend to buildings and other property essential to the discharge of the ordinary business of the national Government, and in the enforcement of the tax those buildings might be taken from the possession and use of the United States." *Per* FIELD, J. in *Wisconsin Central Railroad Co. v. Price County*, 133 U.S.R., at p. 496. Cited by BARTON, J. in the *Municipal Council of Sydney v. The Commonwealth*, *supra*.

### § 183. "NOR SHALL THE COMMONWEALTH."

#### Federal Taxation of State Imports.

Before the establishment of the High Court the meaning of section 114 was the subject of a judicial decision given by the Full Court of New South Wales in the case of the *Attorney-General of New South Wales v. The Collector of Customs of New South Wales*, (1903) 3 S.R. N.S.W., 115 and 9 A.L.R., 23. This was an action to recover £994 paid by the State Government to the defendant in respect of certain customs duties levied on goods imported by the Government for the use of State railways. Justices OWEN and PRING held that the prohibition of section 114 extended not merely to State land

and house property but also to goods and chattels imported by the State and they gave judgment for the State. STEPHEN, A.C.J. considered that the words "tax on property of any kind belonging to a State" must be construed by reference to the same words relating to the Commonwealth which could hardly refer to duties on the importation of goods. The judgment of the majority of the Supreme Court was afterwards over-ruled by the High Court in the case of the *Attorney-General of New South Wales v. The Collector of Customs for New South Wales*, (1908) 5 C.L.R., 818.

The rule laid down in *D'Emden v. Pedder*, 1 C.L.R., 91, at p. 111, and applied to the case of interference by the Commonwealth with State instrumentalities in the *Railway Employees' Case*, has no application to powers which are conferred upon the Commonwealth in express terms and which, by their nature, manifestly involve control of some operation of the State Governments, such as the power to make laws with respect to trade and commerce with other countries and with respect to taxation. It must be assumed that the Constitution intended that, so far as is necessary for the effective exercise of these powers, the rights of State Governments should be restricted. The imposition of Customs duties being a mode of regulating trade and commerce with other countries, as well as an exercise of the taxing power, the right of State Governments to import goods is subject to the customs laws of the Commonwealth. Further, the rule has reference only to the performance of the functions of Government within the Commonwealth, and, therefore, cannot be applied to the importation by a State Government of goods to be afterwards used in connection with one of its instrumentalities: *The Attorney-General (New South Wales) v. The Collector of Customs for New South Wales*, (1908) 5 C.L.R., 818.

In that case the High Court gave judgment for the Commonwealth on two grounds first that the word "tax" in section 114 of the Constitution was not intended to denote indirect taxation such as customs duties and that the levying of duties of customs on importation is not the imposition of a tax upon property within the primary and literal meaning of section 114, standing alone. Second that even if it is an imposition of a tax on property within the primary and literal meaning of that section, yet that meaning is not the only or the necessary meaning; that, it must be rejected as being inconsistent with other plain provisions of the Constitution and that it was the intention of the Legislature that the right of

State Governments to import goods should be subject to the control of the Commonwealth, so that the rule in *D'Emden v. Pedder* 1 C.L.R., 91, has no application.

The rule referred to moreover has reference only to the performance of the functions of Government within the Commonwealth, beyond which the functions of a State Government, *qua* Government, do not extend. Therefore, although the rule prohibits the Commonwealth, in certain cases, from interfering with the free exercise of the executive powers of a State, within the State, in making use of any means or instrumentalities lawfully at its command, it has nothing to say to the question whether any specific thing may be brought within the State so as to become such a means or instrumentality. The interference complained of in the *Railway Employees' Case* related to a function performed wholly within the State, and as to which the Court thought that no power to interfere was given either expressly or by necessary implication. That case, therefore, has no application to the present one: *The Attorney-General (New South Wales) v. The Collector of Customs for New South Wales*, (1908) 5 C.L.R., at p. 834.

#### **Exclusive Federal Power over Imports.**

The Customs Act 1901, being a valid exercise by the Commonwealth of the exclusive power to impose, collect and control duties of customs and excise conferred by sections 52 (ii.), 86 and 90 of the Constitution, applies to goods imported by the Government of a State as well as to those imported by private persons. Therefore, goods imported by a State, whether dutiable or not, are by section 30 of that Act subject to the control of the customs, and the authority of the State Executive is no justification for their removal from that control contrary to the provisions of the Act. A quantity of wire-netting, which had been purchased in England and imported into the Commonwealth by the Government of New South Wales, was landed at the port of Sydney. Without any entry having been made or passed, and without the authority of the customs officers, the defendant, acting under the authority of the Executive Government of the State, removed the goods from the place where they were stored. In an action to recover a penalty it was held by the High Court that the defendant had committed a breach of sections 33 and 236 of the Customs Act. *The King v. Sutton*, (1908) 5 C.L.R. 789.

**Taxation of Crown Leaseholds.**

The Commonwealth Land Tax Assessment Act 1914, under which leasehold estates in State Crown lands are made liable to a land tax, does not amount to a tax on property belonging to the States which is forbidden by section 114 of the Constitution. "The plain design and purpose of the Act is that the lessee of Crown lands shall pay land tax upon and according to the value of his interest in the land and as such it forms a natural part of a general scheme of land taxation": *Per* GRIFFITH, C.J.—"A tax is not placed on a State or in respect of any interest remaining in the State. It is placed on the lessee alone and in respect of what he himself possesses." *Per* ISAACS, J., *Attorney-General (Queensland) v. The Attorney-General (Commonwealth)*, (1915) 20 C.L.R., pp. 161-175.

**Prohibitions Express and Implied.**

In its judgment in *Webb v. Outtrim*, (1907) A.C., 81, the Privy Council referred to section 114 of the Constitution as showing that the inclusion of express prohibitions in the instrument negatived the argument advanced in favor of further and implied prohibitions in accordance with the maxim *expressum facit cessare tacitum*. This reasoning was combated in the judgment of a majority of the High Court in *Baxter v. Commissioner of Taxes, New South Wales*, (1907) 4 C.L.R., p. 1128, where the Chief Justice (Sir SAMUEL GRIFFITH) said:—"The only section to which their Lordships expressly refer, which has any bearing on the application of the maxim *expressum facit, &c.*, is section 114. A little consideration will show that this section is not framed for the purpose of exhaustively defining the prohibitions upon the exercise of State powers, but altogether *alio intuitu*."

States not to coin money.

115. A State shall not coin<sup>184</sup> money, nor make anything but gold and silver coin a legal tender in payment of debts.

**§ 184. "A STATE SHALL NOT COIN."**

**Legal Tender.**

This section illustrates, in a peculiar manner, the distinction between "exclusive" and "concurrent" powers. The coining of money is, by the joint operation of section 51 (xii.) and section 115, exclusively vested in the Commonwealth; it is, by the former,

granted to the Commonwealth, and by the latter withdrawn from the States. On the other hand the legal tender power is granted to the Commonwealth and remains in the States, subject to two conditions, viz., they can only make gold and silver a legal tender in payment of debts, and if there is any inconsistency between State and Commonwealth tender laws the latter prevails. See section 51 (xii.).

### Express and Implied Limitations.

Sections 114, 115, 116 and 117 of the Constitution contain express limitations upon the legislative powers of the States. Those sections deal, though not in identical words, with the same matters as those dealt with respectively in Article I., section 10, sub-section 1; in Article VI., section 3, with the first Amendment, and in Article IV., section 2, and section 1 of the 14th Amendment, of the United States Constitution. That Constitution, therefore, as well as the Australian, contains express prohibitions, but it has never been held that they precluded the admission of those necessary implications which are admitted in all other cases. The framers of the Commonwealth Constitution may be taken to have been aware of this fact, and also of the fact that the doctrine of necessary implication had been applied to the Constitutions of the British Dependencies: *In re Adam*, 1 Moo. P.C.C., 460; *Attorney-General v. Cain and Gilhula*, (1906) A.C., 542. The maxim *expressum facit*, &c., has been often invoked in vain in English Courts: *Colquhoun v. Brooks*, 21 Q.B.D., 52, at p. 65, where LOPES, L.J., called it "a valuable servant, but a dangerous master." *Per* GRIFFITH, C.J. in *Baxter v. Commissioner of Taxes, New South Wales*, (1907) 4 C.L.R., at p. 1128.

Commonwealth not to legislate in respect of religion.

116. The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth.

Rights of residents in States.

117. A subject of the Queen, resident in any State, shall not be subject in any other State to any disability

or discrimination<sup>185</sup> which would not be equally applicable to him if he were a subject of the Queen resident in such other State.

§ 185. "DISABILITY OR DISCRIMINATION."

**Distinction between Residence and Domicil.**

The Administration Act of Western Australia (103), section 86, provides that:—"Every executor and administrator shall pay to the Commissioner of Stamps duty on the final balance of the real and personal estate of the deceased according to the rules set forth in the second schedule. Provided that, in so far as beneficial interests pass to persons *bona fide* residents of and domiciled in Western Australia and occupying towards the deceased the relationship set forth in the third schedule, duty shall be calculated so as to charge only one half of the percentage on the property acquired by such person." Under this Act the plaintiffs, executors of the will of E. W. Davies, late of Fremantle, Western Australia, were called upon to pay succession duty in Western Australia upon the estate of their testator, including duty upon a sum of £8,055, representing the value of property passing under the will to one A. E. Davies, who at the death of the testator was alleged to be a British subject *bona fide* resident and domiciled in the State of Queensland. The rate of duty for the estate in question, according to the rules in the second schedule, was 9 per cent., and A. E. Davies was a person occupying to the deceased the relationship set forth in the third schedule. The Commissioner of Stamps demanded from the plaintiffs in respect to his share duty at the full rate of 9 per cent., which the plaintiffs paid under protest, and they then sued to recover one-half of that sum, claiming under section 117 of the Constitution. It was held by the High Court that the real ground of the discrimination prescribed by the section of the Administration Act was domicil and not residence, and that, consequently, the enactment was not void under section 117 of the Constitution, as setting up a discrimination between the residents of different States: *Davies v. The State of Western Australia*, (1904-5) 2 C.L.R., 29.

"Every State can impose such duties in respect of the whole of the personal property of the domiciled citizens of the State, whether that property is situate within or beyond its territorial



limits. The State may, therefore, derive a much larger revenue from the estates of such persons than from those of others who merely reside in the State without having their domicile in it. The area of taxation being larger in their case, the Legislature may well think it reasonable to reduce the rate in their favour. Moreover, it is a well-known fact that the double liability to death duties, as they are called, i.e., the liability to pay them both to the State of domicile and the State in which the property is situate, has considerable operation upon the minds of investors, and the Legislature might reasonably offer such a reduction as that in question as an inducement to persons to make their permanent home in Western Australia. Again, I think it is a sound rule of construction that a State Act should if possible be so interpreted as not to make it inconsistent with the Constitution—*ut res magis valeat quam pereat*. These reasons have led me—not without some fluctuation of opinion—to the conclusion that the word ‘domiciled’ should be read without the qualifying words ‘*bona fide*’ and should be construed as meaning ‘having their legal domicile’ in Western Australia. On this construction, the discrimination effected by the Act is not a discrimination as between residents of Western Australia and others, but as between persons having their legal domicile in Western Australia and others, and A. E. Davies, not having such a domicile is not entitled to the benefit of the reduction claimed. Whether, if his legal domicile were in Western Australia instead of in Queensland, he would be entitled to claim the reduction, is a question which it is not necessary to consider.” *Per* GRIFFITH, C.J., 2 C.L.R., at p. 43.

“Mere residence in Western Australia does not give any of its inhabitants a better right to resist the higher rate of duty than Mr. Davies has, residing as he does in Queensland. But when residence and domicile concur, the concept of residence is so absorbed in that of domicile that it has no separate existence in thought. Residence in the place of domicile is the normal condition, and residence away from it is in the view of law not permanent until it becomes of such a kind as to merge in its turn into a domicile of choice. Consequently, without the Western Australian domicile, there is no discrimination between subjects of the King residing in Queensland and those residing in Western Australia. It is discrimination on the sole ground of residence outside the legislating State that the Constitution aims at in the 117th section. I do not think that is the ground of the discrimination in the Western Australian Administration Act.” *Per* BARTON, J., 2 C.L.R., at p. 47.

"I find myself unable to avoid the conclusion that the expression 'domiciled in Western Australia' was used by the Legislature not in its popular sense but in the legal and technical sense. So interpreting the section and expanding the expression 'domiciled' into its full meaning, the discrimination is in favour of persons within the named degrees of relationship who are '*bona fide* residents of Western Australia and whose domicile the law deems to be in Western Australia.' It follows therefore that no resident of Western Australia can claim the reduction of duty unless he also has his legal domicile in Western Australia, and the Queensland resident not domiciled in Western Australia is in this respect subject to precisely the same discrimination, and to no further and no other." *Per O'CONNOR, J.*, 2 C.L.R., at p. 52.

**Recognition of laws, &c., of States.<sup>186</sup>**

118. Full faith and credit shall be given, throughout the Commonwealth, to the laws, the public Acts and records, and the judicial proceedings of every State.

**§ 186. "RECOGNITION OF LAWS &c. OF STATES."**

**LEGISLATION.**

**STATE LAWS AND RECORDS RECOGNITION ACT 1901.**

All Courts within the Commonwealth are required to take judicial notice of Acts of the Parliament of a State, of the impression of the Seal of any State, of the signatures of certain high State officials. Proof of State proclamations, commissions, orders, regulations, Acts of State, may be given by the production of the *Government Gazette* of the State or a document purporting to be certified by the Clerk of the Executive of the State or purporting to be certified by a Minister of the Crown for the State. Votes and proceedings of State Parliaments and other public records may be proved in the manner prescribed by the Act. Proof of the incorporation of a company incorporated or registered in any State may be given by a certificate signed by the proper officer.

**Protection of States from invasion and violence.<sup>187</sup>**

119. The Commonwealth shall protect every State against invasion and, on the application of the Executive Government of the State, against domestic violence.

**§ 187. "PROTECTION OF STATES FROM INVASION AND VIOLENCE."****LEGISLATION.****DEFENCE ACT 1903.**

By section 51 of this Act it is provided :—" Where the Governor of a State has proclaimed that domestic violence exists therein, the Governor-General, upon the application of the Executive Government of the State, may, by proclamation, declare that domestic violence exists in that State, and may call out the Permanent Forces, and in the event of their numbers being insufficient may also call out such of the Militia and Volunteer Forces as may be necessary for the protection of that State, and the services of the Forces so called out may be utilized accordingly for the protection of that State against domestic violence."

**Custody of offenders against laws of the Commonwealth.**

120. Every State shall make provision for the detention in its prisons of persons accused or convicted of offences against the laws of the Commonwealth, and for the punishment of persons convicted of such offences, and the Parliament of the Commonwealth may make laws to give effect to this provision.

There has been no State or Commonwealth legislation under this section, but its intention has been generally observed.

## CHAPTER VI.—NEW STATES.

*New States may be admitted or established.*

121. The Parliament may admit to the Commonwealth or establish new States, and may upon such admission or establishment make or impose such terms and conditions, including the extent of representation in either House of the Parliament, as it thinks fit.

*Government of territories.*

122. The Parliament may make laws for the government of any territory<sup>188</sup> surrendered by any State to and accepted by the Commonwealth, or of any territory placed by the Queen under the authority of and accepted by the Commonwealth, or otherwise acquired by the Commonwealth, and may allow the representation of such territory in either House of the Parliament to the extent and on the terms which it thinks fit.

## § 188. "GOVERNMENT OF TERRITORIES."

## LEGISLATION.

## PAPUA ACT 1905.

**New Guinea.**

Prior to 6th March 1902, British New Guinea was a Crown Colony under an Administrator who was subject to the control of the Governor of Queensland, acting with the advice of his Ministers, in the same way as ordinary Crown Colonies are to that of the Secretary of State. By Order-in-Council of 6th March 1902, and Letters Patent of the 18th of the same month, the Possession was placed under the authority of the Commonwealth, and the Governor-General was authorized, as soon as the Parliament should make laws for the government of the Possession, to issue a proclamation declaring that that had been done, and from that date, the Letters Patent dealing with the administration of the Possession and the

instructions issued thereunder should be revoked, and until the appointed day the Governor-General was invested with the powers and duties formerly entrusted to the Governor of Queensland.

There was no acceptance of New Guinea by the Commonwealth until the passing of the Papua Act on 16th November 1905. Before that date the Governor-General was simply the *persona designata* to whom the control formerly exercised by the Governor of Queensland became vested, but in that capacity he did not represent the Commonwealth.

### **Papua.**

The Papua Act 1905 was assented to on 16th November 1905. The Possession of British New Guinea was declared to be accepted by the Commonwealth as a territory under the authority of the Commonwealth, by the name of the Territory of Papua. The laws in force in the Possession of British New Guinea at the commencement of this Act were continued in force in the Territory until other provision was made. The Courts of justice in existence in the Possession of British New Guinea at the commencement of this Act, and the jurisdiction, practice, and procedure thereof, were continued in the Territory until other provision was made. All judges, magistrates, and other officers in the public service of the Possession of British New Guinea at the commencement of this Act were to continue in office as if appointed under this Act. It was provided that there should be a Lieutenant-Governor of the Territory, who should be charged with the duty of administering the government thereof on behalf of the Commonwealth. An Executive Council for the Territory was created to advise and assist the Lieutenant-Governor; a Legislative Council was created to consist of the Lieutenant-Governor and of the members of the Executive Council, together with such non-official members as the Governor-General appoints under the Seal of the Commonwealth, or as the Lieutenant-Governor, in pursuance of instructions from the Governor-General, appoints under the Public Seal of the Territory. So long as the white resident population is less than 2,000, the number of non-official members shall be three; but when the white resident population is 2,000 or more an additional non-official member shall be appointed for each 1,000 of such population in excess of 1,000. The Legislative Council has power to make Ordinances for the peace, order and good government of the Territory. The revenues of the Territory are available for defraying the expenditure thereof, and

the Governor-General may make such regulations as he deems necessary for the receipt, expenditure, control and audit of revenues and moneys of the Territory. There is to be paid out of the Consolidated Revenue Fund of the Commonwealth towards the revenues of the Territory the sum of £20,000 in each financial year up to and including the financial year ending 30th June 1906, and thereafter such sums, if any, as the Parliament appropriates for that purpose.

### Officers of the Possession.

In the case of *Strachan v. The Commonwealth*, (1906) 4 C.L.R., 455, the plaintiff brought an action in the High Court against the Commonwealth to recover damages in respect of alleged wrongful acts of officers of the Possession of New Guinea, committed in May 1905, at a date prior to any legislation by the Commonwealth on the subject of New Guinea. It was held by the High Court that until such legislation took place, and the proclamation consequent thereon was made, no such relationship of master and servant existed between the Commonwealth Government and the officials of the Possession as would render the Commonwealth liable in an action of tort for wrongful acts of such officers: *Tobin v. The Queen*, 16 C.B.N.S., 310, applied.

### Trial by Jury in Territories.

There is no doubt or question as to power of the Federal Parliament to create a local Legislature to pass laws for the Government of a Territory as has been done in the Papua Act, No. 9 of 1905.

By an Ordinance, No. 7 of 1907, passed after the transfer of the Possession to the Commonwealth it was enacted that the trial of persons of European descent charged with a crime punishable with death should be held before a jury of four persons, but that "save as aforesaid the trial of all issues, both civil and criminal, shall as heretofore be held without a jury."

In the Central Court of Papua, before His Honor, J. H. P. MURRAY, Chief Judicial Officer, George Bernasconi was tried on a charge of assault causing bodily harm, and was found guilty and sentenced to twelve months' imprisonment with hard labour. At the request of the solicitor for the accused, His Honor stated a case reserving for the consideration of the High Court the following question:—Whether the accused's deemed request for a jury was rightly refused?

It was held by the High Court that Chapter III. of the Constitution including section 80 providing for the trial of indictable offences by jury was limited in its application to the exercise of the judicial power of the Commonwealth in respect of those functions of Government as to which it stands in the place of the States, and has no application to territories. Section 80, therefore, relates only to offences created by the Parliament by Statutes passed in the execution of those functions, which are aptly described as "Laws of the Commonwealth."

"In my opinion," said GRIFFITH, C.J., "the power conferred by section 122 is not restricted by the provisions of Chapter III. of the Constitution, whether the power is exercised directly or through a subordinate Legislature. The first question raised by the case, which is whether the request for a jury alleged to have been applied by the plea of 'not guilty' was rightly refused, must therefore be answered in the affirmative": *The King v. Bernasconi*, (1915) 19 C.L.R., at pp. 633-635.

"Section 80 of the Constitution" said Mr. Justice ISAACS, "is one of a *fasciculus* of sections collected in one chapter and united and inter-related as members of a distinct group under the title of 'The Judicature.' The 'judicial power of the Commonwealth'—that is, the whole judicial power of a Commonwealth proper—is there dealt with. By force of the various sections of Chapter III. other than section 80 and aided by sub-section (xxxix.) of section 51, Parliament might have enacted, or might have enabled Courts to provide by rules, that all offences whatever should be tried by a Judge or Judges without a jury. Section 80 places a limitation on that power. Neither Parliament nor Court may permit such a trial. If a given offence is not made triable on indictment at all, then section 80 does not apply. If the offence is so tried, then there must be a jury. But the provision is clearly enacted as a limitation on the accompanying provisions, applying to the Commonwealth as a self-governing community. And that is its sole operation. When the Constitution, however, reaches a new consideration, namely, the government of territories, not as constituent parts of the self-governing body, not 'fused with it,' as I expressed it in *Buchanan's Case*, 16 C.L.R., 315, at p. 335, but rather as parts annexed to the Commonwealth and subordinate to it, then section 122 provides the appropriate grant of power." *Per* ISAACS, J., 19 C.L.R., at p. 637.

**Annual Cost.**

The total expenditure in connection with the administration of Papua amounted in 1917-18 to £144,693. The revenue and receipts estimated (including the Commonwealth subsidy of £31,000) amounted to £113,122.

**NORTHERN TERRITORY ACCEPTANCE ACT 1910.**

This Act, assented to 16th November 1910, provided for the acceptance of the Northern Territory as a Territory under the authority of the Commonwealth and for the carrying out of the agreement for the surrender and acceptance.

By letters patent of Her late Majesty QUEEN VICTORIA, bearing date the 6th July 1863, and signed by warrant under the Queen's Sign Manual, the Northern Territory, as defined in this Act, was annexed to the Province of South Australia.

By the Constitution Act the Province of South Australia, including the Northern Territory of South Australia, became a part of the Commonwealth by the name of the State of South Australia.

On 7th December 1907, an agreement was entered into by the Commonwealth and the State of South Australia for the surrender of the Northern Territory by South Australia to the Commonwealth subject to certain terms and conditions. This agreement was ratified and approved by the Commonwealth Parliament, and by the legislation of South Australia. The principal terms of the agreement were as follows :—

In consideration of the surrender of the Northern Territory and the property of the State of South Australia therein and certain other rights, the Commonwealth agreed to be responsible for the indebtedness of the State in respect of the Northern Territory as from the date of acceptance of such surrender and relieve the State from the said indebtedness. The Commonwealth agreed to construct a railway line from Port Darwin southward to a point on the northern boundary of South Australia proper—which railway, with the railway from a point on the Port Augusta railway to connect therewith, is referred to as the Transcontinental Railway. The Commonwealth acquired from South Australia the Port Augusta railway, including all lands reserved for such a railway, together with all stations and other buildings, sidings, wharfs, and other accessories used in connection with the working of the said



railway except the railway carriages, trucks and other movable plant and rolling stock. The Commonwealth agreed to construct, as part of the Transcontinental Railway a railway from a point on the Port Augusta railway to connect with the other part of the Transcontinental Railway at a point on the northern boundary of South Australia proper. The Commonwealth agreed to pay the price of the Port Augusta Railway by becoming responsible for the amount of loans raised by the State for the purpose of constructing the said railway and by annually reimbursing the State the interest payable thereon and by paying annually into a Commonwealth sinking fund the amounts which the State has undertaken to pay into such a fund in connection with the said loans until the said loans are paid and redeemed by the Commonwealth.

In consideration of the covenants and agreements by the Commonwealth, the State surrendered to the Commonwealth the Northern Territory including the railway from Port Darwin southwards known as "The Palmerston and Pine Creek Railway" and all the State's right, titles and interest in the control of all real and personal property in the Northern Territory.

By section 7 of the Territory Acceptance Act all laws of South Australia in force in the Territory at the time of acceptance continued in force until altered or repealed by Commonwealth legislation. By section 8, all Courts of Justice in existence in the Territory at the time of its acceptance are to continue until other provision is made by or under any law of the Commonwealth. By section 10, all estates and interests held from the State of South Australia within the Territory at the time of its acceptance shall continue to be held from the Commonwealth on the same terms and conditions. By section 19, nothing in the Act is to be taken as an appropriation of any revenues or money.

#### NORTHERN TERRITORY ADMINISTRATION ACT (1910).

The Governor-General was by this Act authorized to appoint an Administrator to exercise all powers and functions assigned to him, under his commission, to act according to such instructions as may be given to him by the Minister of External Affairs. By section 5 where any law of the State of South Australia continues in force in the Territory by virtue of the Acceptance Act, it is subject to any Ordinance made by the Governor-General to have effect in the Territory as if it were a law of the Territory. Section 11 pro-

vides that no Crown land in the Territory shall be sold or disposed of for any estate of freehold except in pursuance of some contract made before the passing of the Act. By section 13, until the Parliament makes other provisions for the Government of the Territory, the Governor-General in Council is empowered to make Ordinances having the force of law in the Territory. Section 12 gives the several Courts of South Australia, subject to any Ordinance to be made, the same jurisdiction for the enforcement of all laws in the Territory and the administration of justice therein as they had before the commencement of the Act.

### Operation of South Australian Law.

The effect of the provisions of section 7 of the Acceptance Act and section 5 of the Administration Act were considered by the High Court in *Buchanan and Another v. The Commonwealth and Another*, (1913) 16 C.L.R., 315. It was held that so far as those sections purport to give effect in the Northern Territory, as laws of the Commonwealth, to laws of South Australia which impose taxation they are valid.

The executors of a will of a deceased person who owned certain property in the Northern Territory applied to the Judge of the Northern Territory to have an exemplified copy of the probate which had been granted in New South Wales re-sealed with the seal of the Northern Territory. It was decided that they were not entitled to have the exemplified copy of the probate so re-sealed except on payment, in respect of the property in the Northern Territory, of the succession and probate duties imposed by the Succession Duties Act 1893 (S.A.) and the Administration and Probate Act 1891 (S.A.).

Section 122 of the Constitution contains all the necessary power to legislate for a Territory, including the imposition or continuance of any kind of taxation. It does not need any assistance from section 51 of the Constitution in respect either of taxation, or of anything else. It would suffice for all its purposes if there were no section 51 at all. It is more ample than section 51 for all the purposes of a Territory. *Per* BARTON, Acting C.J. in *Buchanan v. The Commonwealth*, 16 C.L.R., at p. 327.

“The Commonwealth Statutes in terms adopt and in effect re-enact the Acts of South Australia so far as they apply to the Territory in its new condition, and certainly include the two Acts

in question. But the clear power contained in section 122 of the Constitution is independent of that contained in section 51 sub-section (II). The last-named power—'Taxation; but so as not to discriminate between States or parts of States'—applies only to the Commonwealth proper. The Northern Territory, though 'annexed' to South Australia, and in one sense a 'part' of that political organism, was always known by the distinctive name of the 'Northern Territory,' and in the official despatches between the Government of South Australia and the Colonial Office references were made to South Australia proper and to the Northern Territory *per* WAY, C.J. in *Adelaide Steamship Co. Ltd. v. Wells*, 18 S.A.L.R., 111, at p. 115. And now that it is a Territory of the Commonwealth, it is not fused with it, and the provisions of sections 53 and 55 of the Constitution, intended to guard the Senate and the States, have no application to the Northern Territory. The taxation involved in the Northern Territory Acts is quite outside the 'taxation' referred to in section 55 of the Constitution. Consequently, assuming the South Australian Acts in question do not continue by mere force of cession, still their introduction by means of the Commonwealth Acts is unaffected by the provisions of section 55." *Per* ISAACS, J. in *Buchanan v. The Commonwealth*, 16 C.L.R., at pp. 334-335.

### Judicial Officers.

The jurisdiction which, before the Northern Territory Acceptance Act 1910, was passed, a Special Magistrate of South Australia had under section 68 (2) of the Judiciary Act with respect to the summary conviction of persons charged with offences against the laws of the Commonwealth committed within the Northern Territory, was renewed both as to subject matter and locality by section 8 of the Northern Territory Acceptance Act 1910. It was held, therefore, that a Special Magistrate of the Northern Territory had jurisdiction to entertain and determine a complaint for an offence against the War Precautions Regulations 1915, committed in the Territory: *Mitchell v. Barker*, 24 C.L.R., 365.

### Debts and Obligations.

The Northern Territory loans taken over by the Commonwealth from South Australia amounted, on 30th June 1918, to £2,772,515. The capital indebtedness of the Port Augusta-Oodnadatta Railway

transferred by South Australia to the Commonwealth, amounted on 30th June 1918, to £3,159,256. The total capital liabilities taken over by the Commonwealth were £5,931,178.

### Annual Cost of Northern Territory.

#### A. Ordinary Annual Votes and Appropriations— 1918-19.

Ordinary expenses	..	..	..	}	£416,326
Interest on loans	..	..	..		
Railway expenses	..	..	..		
Sinking Fund	..	..	..		
Railway surveys	..	..	..		

B. New works and buildings paid out of Revenue £10,000

C. Railway Construction Line Fund .. .. £17,500

D. Redemption of South Australian loans .. £339,408

#### Total Northern Territory and Port Augusta-

Oodnadatta Railway .. .. £783,234

Total .. .. £1,566,463

#### Alteration of limits of States.

123. The Parliament of the Commonwealth may, with the consent of the Parliament of a State, and the approval of the majority of the electors of the State voting upon the question, increase, diminish, or otherwise alter the limits of the State, upon such terms and conditions as may be agreed on, and may, with the like consent, make provision respecting the effect and operation of any increase or diminution or alteration of territory in relation to any State affected.

#### Formation of new States.

124. A new State may be formed by separation of territory from a State, but only with the consent of the Parliament thereof, and a new State may be formed by the union of two or more States or parts of States, but only with the consent of the Parliaments of the States affected.

## CHAPTER VII.—MISCELLANEOUS.

## Seat of Government.

125. The seat of Government<sup>189</sup> of the Commonwealth shall be determined by the Parliament, and shall be within territory which shall have been granted to or acquired by the Commonwealth, and shall be vested in and belong to the Commonwealth, and shall be in the State of New South Wales, and be distant not less than one hundred miles from Sydney.

Such territory shall contain an area of not less than one hundred square miles, and such portion thereof as shall consist of Crown lands shall be granted to the Commonwealth without any payment therefor.

The Parliament shall sit at Melbourne until it meet at the seat of Government.

## § 189. "SEAT OF GOVERNMENT."

## LEGISLATION.

## SEAT OF GOVERNMENT DALGETTY ACT 1904.

By this Act it was determined that the Seat of Government of the Commonwealth should be within seventeen miles of Dalgetty in the State of New South Wales. The territory to be granted to or acquired by the Commonwealth, within which the Seat of Government was to contain an area not less than 900 square miles, and have access to the sea. The amount of the compensation to be paid by the Commonwealth for any land to be acquired by the Commonwealth within the Seat of Government or the surrounding territory should not exceed the value of the land on 1st January 1904, but in other respects the provisions of the Property for Public Purposes Acquisition Act 1901 was to apply to the acquisition of such land.

## SEAT OF GOVERNMENT YASS-CANBERRA ACT 1908.

The Seat of Government Dalgetty Act 1904 was by this Act repealed, and it was determined that the Seat of Government of the Commonwealth shall be in the district of Yass-Canberra in the State of New South Wales. The territory to be granted to or acquired by the Commonwealth for the Seat of Government shall contain an area not less than 900 square miles, and have access to the sea. Any person thereto authorized in writing by the Minister may, for the purpose of any survey of land with a view to ascertaining the territory proper to be granted to or acquired by the Commonwealth for the Seat of Government, enter upon and remain on any lands whether Crown lands of the State of New South Wales or not, and do thereon all things for the purposes of the survey, and shall do no more damage than is necessary. The amount of the compensation to be paid by the Commonwealth for any land to be acquired by the Commonwealth within the territory granted to or acquired by the Commonwealth for the Seat of Government shall not exceed the value of the land on the 8th October 1908, and in other respects the provisions of the Lands Acquisition Act 1906 shall apply to the acquisition of the land.

## SEAT OF GOVERNMENT ACCEPTANCE ACT 1909.

The Governor-General is hereby authorized to declare by proclamation that, on and from a day to be fixed by the proclamation (in this Act referred to as the proclaimed day), the Territory described in the Second Schedule to this Act, and surrendered by the State of New South Wales to the Commonwealth, is accepted by the Commonwealth as a Territory of the Commonwealth. This Act was proclaimed to commence on 22nd January 1910: *Government Gazette*, 20th January 1910.

The Act ratified and confirmed an agreement made on 18th October 1909, between the Commonwealth of the one part and the State of New South Wales of the other part, by which the State agreed to surrender and the Commonwealth agreed to accept the Yass-Canberra Territory as Federal Territory within which the Seat of Government shall be established. The Act declared and determined "that the Seat of Government shall be in the Territory described in the Second Schedule of this Act." The Governor General was authorized to declare by proclamation that, on and

from a day to be fixed by the proclamation (in this Act referred to as the proclaimed day), the Territory describes in the Second Schedule to the Act, and surrendered by the State to the Commonwealth, "is accepted by the Commonwealth as a Territory of the Commonwealth." The effect of the proclamation was that, on and from the proclaimed day (1st January 1910) the Territory was in law accepted by the Commonwealth and acquired by the Commonwealth for the Seat of Government. All laws in force in the Territory immediately before the proclaimed day were, so far as applicable continued in force until other provisions were made. Where by any State laws in force in the Territory, on the proclaimed day, any power or function was vested in the Governor of the State, or in any authority of the State, that power or function in relation to the Territory was vested in and exercised or performed by the Governor-General, or the authority exercising similar powers and functions under the Commonwealth, as the case required or as the Governor-General directs: "Provided that the Governor-General may direct that any such power or function may be exercised or performed on behalf of the Commonwealth by the authority of the State in which it was previously vested; and while that direction remains in force the authority of the State shall, in regard to the exercise or performance of that power or function, be deemed to be an authority of the Commonwealth."

All estates and interests in any land in the Territory which were held by any person from the State immediately before the proclaimed day, subject to any law of the Commonwealth, continue to be held from the Commonwealth on the same terms and conditions as they were held from the State.

The High Court and the Justices thereof acting within the Territory were invested with the jurisdiction which immediately before the proclaimed day belonged to the Supreme Court of the State and the Justices thereof. The Governor-General was authorized to appoint such magistrates and officers as are necessary to execute the laws of the Territory and provide for the administration of justice thereunder.

The Seat of Government Act 1910 makes temporary provision for the administration and government of the Federal Territory in which the Seat of Government is situated.

## JUDICIARY ACT 1903, Section 10.

The principal seat of the High Court is to be at the Seat of Government. Until the Seat of Government is established, the principal seat of the High Court shall be at such place as the Governor-General from time to time appoints.

## COMMONWEALTH CONCILIATION AND ARBITRATION ACT 1904.

By section 52 the principal Registry shall, when the Seat of Government is established within Federal territory, be situated at the Seat of Government, but until that time the Principal Registry shall be situated at such place as the Minister directs.

**Acquisition of Land.**

On 1st May 1915, the Commonwealth, pursuant to the Lands Acquisition Act 1906, compulsorily acquired certain land of the respondent at Jervis Bay, then in the State of New South Wales. On 25th August 1915, the respondent made a claim for compensation in respect of such acquisition. On 4th September 1915, the Jervis Bay Territory Acceptance Act 1915, came into operation, and the land in question thereafter was within territory acquired by the Commonwealth for the Seat of Government. On 5th May 1916, the respondent refused an offer which had been made to him in respect of his claim for compensation, and on 7th March, 1917, by writ of summons instituted an action in the Supreme Court of New South Wales against the Commonwealth to recover compensation. Held, that the cause of action arose on 5th May 1916; that the jurisdiction which the Supreme Court of New South Wales originally had in respect of the land was taken away by section 8 of the Seat of Government Acceptance Act 1909 (which is incorporated in the Jervis Bay Territory Acceptance Act 1915, by section 4 thereof); that that Court was not a "State Court of competent jurisdiction" within the meaning of section 37 of the Lands Acquisition Act 1906; and, therefore, that it had no jurisdiction to entertain the action. *Woodhill v. Commonwealth of Australia*, 17 S.R., 224, reversed: *Commonwealth v. Woodhill*, 23 C.L.R., 482; 18 S.R., 100.

Power to Her Majesty to authorize Governor-General to appoint deputies.

126. The Queen may authorize the Governor-General to appoint any person, or any persons jointly or severally, to be his deputy or deputies within any



part of the Commonwealth, and in that capacity to exercise during the pleasure of the Governor-General such powers and functions of the Governor-General as he thinks fit to assign to such deputy or deputies, subject to any limitations expressed or directions given by the Queen ; but the appointment of such deputy or deputies shall not affect the exercise by the Governor-General himself of any power or function.

Aborigines not to be counted in reckoning population.

127. In reckoning the numbers of the people of the Commonwealth, or of a State or other part of the Commonwealth, aboriginal natives shall not be counted.

## CHAPTER VIII.—ALTERATION OF THE CONSTITUTION.

*Mode of altering the Constitution.* 190

128. This Constitution shall not be altered except in the following manner :—

The proposed law for the alteration thereof must be passed by an absolute majority of each House of the Parliament, and not less than two nor more than six months after its passage through both Houses the proposed law shall be submitted in each State to the electors qualified to vote for the election of members of the House of Representatives.

But if either House passes any such proposed law by an absolute majority, and the other House rejects or fails to pass it or passes it with any amendment to which the first-mentioned House will not agree, and if after an interval of three months the first-mentioned House in the same or the next session again passes the proposed law by an absolute majority with or without any amendment which has been made or agreed to by the other House, and such other House rejects or fails to pass it or passes it with any amendment to which the first-mentioned House will not agree, the Governor-General may submit the proposed law as last proposed by the first-mentioned House, and either with or without any amendments subsequently agreed to by both Houses, to the electors in each State qualified to vote for the election of the House of Representatives.

When a proposed law is submitted to the electors the vote shall be taken in such manner as the Parliament prescribes. But until the qualification of electors of members of the House of Representatives becomes uniform throughout the Commonwealth, only one-half the electors voting for and against the proposed law shall be counted in any State in which adult suffrage prevails.

And if in a majority of the States a majority of the electors voting approve the proposed law, and if a majority of all the electors voting also approve the proposed law, it shall be presented to the Governor-General for the Queen's assent.

No alteration diminishing the proportionate representation of any State in either House of the Parliament, or the minimum number of representatives of a State in the House of Representatives, or increasing, diminishing, or otherwise altering the limits of the State, or in any manner affecting the provisions of the Constitution in relation thereto, shall become law unless the majority of the electors voting in that State approve the proposed law.

### § 190. "ALTERATION OF CONSTITUTION."

#### LEGISLATION.

#### REFERENDUM (CONSTITUTION ALTERATION) ACT 1906.

This Act provides the necessary machinery and procedure for submitting to the people proposed laws for the alteration of the Constitution which have been passed by the Senate and House of Representatives. The first step prescribed is the issue of a writ by the Governor-General. Attached to writ is a copy of the proposed law, and the text of the principal provisions of the Constitution proposed to be altered. The voting at the referendum must be taken throughout Australia on the day appointed on the writ: the voting at the referendum must be by ballot and each elector

is required to indicate his vote whether " Yes " or " No " by placing a cross in the blank square in front of the word " Yes " or by placing a cross in the blank square in front of the word " No " according to his choice. The result of the referendum is afterwards ascertained by scrutiny.

**REFERENDUM (CONSTITUTION ALTERATION) 1909.**

This Act makes a number of amendments in the Principal Act defining the mode of conducting a reference to the people in connection with proposed alterations of the Constitution.

**Proposed Constitutional Amendments.**

For details of proposed laws to amend the Constitution, see *supra* pp. 20-22, 305, 500, 588, 606, 613 and *infra* p. 945.

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**SCHEDULE.**

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**OATH.**

I, *A.B.*, do swear that I will be faithful and bear true allegiance to Her Majesty Queen Victoria, Her heirs and successors according to law. So **HELP ME GOD** !

**AFFIRMATION.**

I, *A.B.*, do solemnly and sincerely affirm and declare that I will be faithful and bear true allegiance to Her Majesty Queen Victoria, Her heirs and successors according to law.

(NOTE.—*The name of the King or Queen of the United Kingdom of Great Britain and Ireland for the time being is to be substituted from time to time.*)



# LEGISLATIVE POWERS OF THE COMMONWEALTH AND THE STATES OF AUSTRALIA.

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## APPENDIX.

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CONSTITUTION, Section 51 (II.).

### “TAXATION.”

The Income Tax Act 1918 provides that a tax of ten per centum of the gross prize money is payable in respect of a cash prize in a lottery.

For every pound sterling of the taxable income of a company which has not been distributed to the members or shareholders of the company, the rate of tax is one shilling and tenpence halfpenny.

For every pound sterling of the income of a company distributed to the members, shareholders or stockholders of the company who are absentees and of interest paid or credited by the company to any person who is an absentee in respect of debentures of the company or on money lodged at interest with the company by such person the rate of tax shall be sixpence.

The Estate Duty Assessment Act 1914-16 authorizes the taxation of property which has passed from a deceased person by gift *inter vivos* within one year prior to his decease.

The War Time Profits Tax Assessment Act 1917 does not operate on profits arising after 30th June 1919.

CONSTITUTION, Section 51 (IV.).

### “BORROWING MONEY.”

A brief review of the financial position of the Commonwealth was given by the Treasurer (Mr. WATT) in the House of Representatives on 25th June 1919.

Speaking on a supply bill for the sum of £4,237,335, Mr. WATT said the seven war loans had brought in a total of £188,432,040. To that must be added receipts from War Savings Certificates totalling £5,140,493. The total amount raised was therefore £193,572,533. Australia had borrowed direct from the British Government £47,500,000, while the British Government had further paid for the maintenance of Australian troops overseas another £70,000,000. Of this last amount Australia had repaid £26,000,000, leaving £44,000,000 still to be paid. The amount borrowed altogether totalled £285,717,553. There was on hand on 31st May unexpended war loan moneys amounting to £24,176,449. Deducting this amount from the total borrowed there was an expenditure to 31st May of £261,541,104. At the Premier's Conference the Commonwealth had agreed to lend the States £30,000,000, to enable them to carry out a programme of settling 20,000 soldiers on the land. The requirements for the War Service Homes Act would be large, but could not be definitely indicated, while sustenance payments would also require considerable funds. With the heavy expenditure in prospect it would be necessary before long to raise another war loan. The annual interest on war debts amounted to £13,170,000. Of that amount there was payable to the Australian lender £8,560,000 per year, and to the British lender £4,610,000 per year. —*The Age*, 26th June, 1919.

For earlier figures see p. 54, *supra*.

#### CONSTITUTION, Section 51 (vi.).

### “NAVAL AND MILITARY DEFENCE.”

#### DEFENCE ACT 1903-1918.

It may be interesting to state more fully the law in force on British ships conveying Commonwealth troops from Australia to the sphere of military operations and returning therefrom to Australia, also the law controlling the discipline of Australian troops, whilst serving abroad.

The Army Act (Imperial) applies subject to such modifications as are prescribed by the Defence Act 1903-1918 or the Regulations made thereunder (Defence Act, section 54A). As to the power of the Commonwealth to make laws of extra-territorial application in relation to such troops: see section 177 of the Army Act (Imperial). The modifications made by the Defence Act 1903-1918 are those contained in sections 97 and 98. There are no substantial modifications or adaptations effected by the Regulations. When Australian troops are attached to or doing duty or acting with British Forces they are subject to the Army Act (section 177).

During the progress of the war, it was stated in the press, that Australian soldiers were not liable to the same pains and penalties as British soldiers. This difference probably arose from the modifications made by the Defence Act, sections 97 and 98. Section

98 gives a list of offences for which an Australian soldier might be sentenced to death whilst serving abroad. This list does not include the crime of murder. Several cases of murder by Australian soldiers were tried by Court Martial, but in view of this provision, the death penalty could not be inflicted.

Similarly the provision requiring reference of all death sentences to the Governor-General for confirmation prevents the prompt carrying into force of the sentence of death for, say, desertion to the enemy.

Only alien enemies or persons subject to the Naval Discipline Act or to military law may be tried by court martial.

A more extended reference may also be made to the law controlling the discipline of sailors and seamen on board Australian ships of war, when associated with the Imperial Fleet. The Naval Discipline Act applies without modification or adaptation to the Commonwealth Naval Forces serving with the King's Naval Forces. Subject to the conditions of transfer, section 42, sub-section (4) of the Naval Defence Act 1910-1912 renders Commonwealth Naval Forces transferred to the King's Naval Forces in pursuance of that section, subject, while so transferred, to the laws and regulations governing the King's Naval Forces. By a Proclamation dated 10th August 1914 the Governor-General transferred the Commonwealth Naval Forces to the King's Naval Forces unconditionally. In this connection see also the Naval Discipline (Dominion Naval Forces) Act 1911 (Imperial).

Compulsory training requirements are as follows :—

All boys, 12 to 14 years of age, are compelled to train in the Junior Cadets, and those 14 to 18 years of age in the Senior Cadets. The training includes elementary drill and physical exercises. Young men, 18 to 25 years of age, are required to train in the Citizen Forces from 16 to 25 whole days annually, in organizations known as the Militia. At least 8 days must be in camps of continuous training. There are no general exemptions except for men in outlying districts where training is impracticable, and those medically unfit. From 25 to 26 years of age the training in the Citizen Forces is limited to one registration or muster parade.

CONSTITUTION, Section 51 (xxiii.).

### **“INVALID AND OLD-AGE PENSIONS.”**

Old-age pensions may be granted to persons who have attained the age of 65 years, or who being permanently incapacitated for work have attained the age of sixty years. Women are qualified to receive old-age pensions who have attained the age of sixty years.



The qualifications for old-age pensions are as follows :—Residents in Australia twenty years ; good character ; that the accumulative property of the applicant does not exceed the sum of £310. The net capital value of property is assessed as follows :—All real and personal estate owned by a person is deemed to be accumulative property. From the capital value of such property there shall be deducted the capital value of a home in which the pensioner permanently resides and all charges and expenses in connection with the home ; the residue remaining is deemed to be the net capital value of accumulative property.

CONSTITUTION, Section 51 (xxiv.).

### **“SERVICE AND EXECUTION OF PROCESS.”**

SERVICE AND EXECUTION OF PROCESS ACT 1918.

The Principal Act is amended by authorizing the issue of summonses or warrants in one State for service or execution in another State, charging putative fathers with having failed to make adequate provision for payment of maternity expenses in connection with the birth or for the future maintenance of their putative children.

CONSTITUTION Section 51 (xxxv.).

### **“INDUSTRIAL DISPUTE.”**

#### **During Currency of Award.**

The Arbitration Court cannot entertain a claim involving an alteration of an original existing award during the term of its currency, but new disputes may arise respecting new subjects matter : *Federated Gas Employees' Union v. Gas Company, The Argus*, 12th June 1919.

CONSTITUTION, Section 73.

### **“APPELLATE JURISDICTION OF HIGH COURT.”**

#### **Mis-trial.**

In an action to recover damages for personal injuries alleged to have been sustained by the plaintiff by reason of the negligence of the defendants, the jury found a verdict for the defendants. The Full Court of the Supreme Court of Tasmania refused an application by the plaintiff for a new trial. On appeal, the High Court, being of opinion that there had been a mis-trial, directed a new trial to be had. Decision of the Supreme Court of Tasmania reversed : *Campbell v. Webster Rometch Ltd.*, (1918) 24 C.L.R., 307.

**Appealable Amount.**

In order that a judgment may fall within sub-clause 2 of clause (a) of section 35 (1) of the Judiciary Act 1903-1915, it must involve directly or indirectly a determination which so prejudicially affects the litigant wishing to appeal from it as to make him worse off by at least £300 than he would be if he appealed and were wholly successful in his appeal: *Beard v. Perpetual Trustee Co.*, (1918) 25 C.L.R., 1.

CONSTITUTION, Section 77 (III.).

**“INVESTING STATE COURTS WITH FEDERAL JURISDICTION.”**

The Service and Execution of Process Act 1901, section 10, enabling the defendant served with a summons under the Act to apply to the State Court out of which the writ was issued for an order requiring the complainant to give security for cost, is valid as investing the State Court with Federal jurisdiction: *McGlew v. New South Wales Malting Co. Ltd.*, (1918) 25 C.L.R., 416.

CONSTITUTION, Section 71.

**“A CHIEF JUSTICE.”**

After a long and distinguished career the Right Honorable Sir SAMUEL GRIFFITH, Chief Justice of the High Court tendered his resignation to the Government which was announced by the Honourable L. E. GROOM, Acting Attorney-General on 25th July 1919. In accepting the resignation on behalf of the Government, the Minister addressed the following communication to the retiring Chief Justice :—

“On behalf of the Government and the people of the Commonwealth, on this, the last occasion that your Honor will sit in this Court as Chief Justice of Australia, I desire to express grateful appreciation of your great services to this Commonwealth. It is but fitting that you should bid farewell to your judicial office in the State where you had already achieved a wide reputation as a statesman and judge before you accepted your present distinguished office. On 7th October 1903, when you took your seat for the first time in the High Court, and the felicitations of the Bar of the Australian States were tendered to you, you remarked in reference to the weighty and responsible duties that you were then undertaking. You are now putting the harness off after a great judicial career upon the High Court Bench, which has been marked by the exercise of these great qualities and the preservation of those high ideals and noble traditions which have ever distinguished the British and Australian judiciary. In 1903 when you and your colleagues were charged with the duty of the interpretation of the fundamental instrument of government and the settlement of the great issues

which were inevitable under a written Constitution, legislation and administration under the Australian Constitution were only in their infancy. Since then the national functions of the Commonwealth have expanded to a wondrous extent and the duties and responsibilities of the High Court correspondingly increased. In the performance of those duties you brought to bear the strictest impartiality, great research and learning, and a judgment ripened by a wide experience obtained through the occupancy of the many high offices you had held in the State of Queensland. It is universally recognized by the profession and the public that your decisions have been wise and weighty and have most materially helped to the efficient working of the Constitution and the progress of the people under national administration. The High Court has also won for itself under your presidency as a Court of Appeal from the Courts of the States the confidence of the citizens of those States, and in these decisions your individual judgments constitute an invaluable contribution to the law of Australia. On behalf of the members of the Bar, I wish also to express to you their appreciation of the courtesy and consideration which you have constantly shown to them in the exercise of their high calling in this Court. We are all conscious of the great privilege it has been to appear before you. You are now retiring after a career rich in the accomplishment of lasting benefit to your country. The State, the Commonwealth and the Empire are under obligations to you for great work done in every office you have held. When the history of Australia is written no name will be more honoured than that of the first Chief Justice of Australia. Our wishes are that you may now spend the rest of your days in rest and comfort, conscious of the esteem of your fellow citizens."

In the High Court sitting in Brisbane on 25th July there was a large attendance of the members of the Bench and the Bar in anticipation of a statement by Sir SAMUEL GRIFFITH regarding his projected retirement. Sir SAMUEL GRIFFITH, however, was indisposed and unable to attend, but the Registrar of the High Court read a statement from him announcing his retirement, which will take effect at the end of August. In the statement His Honor pointed out that it was more than a quarter of a century since he took his seat as Chief Justice of the Supreme Court of Queensland, and nearly 16 years since he became Chief Justice of the Commonwealth. He did not think the present was a fit time for him to make anything like a personal retrospective review of his work in the Court since its inception, but he hoped to be able, when no longer bound by the trammels of his judicial office, to make occasional contributions to the solution of the social problems by which we were confronted.

Mr. Justice ISAACS, on behalf of himself and his brother Judges, paid a striking tribute to Sir SAMUEL GRIFFITH. The Attorney-General for Queensland (Mr. RYAN) read a message from Mr. L. E. GROOM (Acting Attorney-General) and eulogised Sir SAMUEL GRIFFITH as a statesman and politician. Mr. FREEZ, K.C., spoke on behalf of the Bar.

## CONSTITUTION, Section 122.

## “ TERRITORIES.”

**Papuan Credit Balance.**

The Minister for Home and Territories (Mr. GLYNN) has received a report from Papua regarding the receipts and expenditure for the year ended on March 31. The total revenue, including about £19,000 carried forward from the previous year, amounted to £84,852, while the expenditure was £75,110. The year, therefore, ended with a credit balance of £9,742. By a policy of economy, expenditure was kept down £12,000 below the estimates. The shortage of shipping owing to the War affected the Customs and excise duty considerably. Despite this, 1,214 tons of copra, valued at £24,279, was exported for the six months ended December 1918. The production of gold in the Samarai district showed an increase of about £5,000, and that of pearl showed an increase of nearly £10,000: *The Argus*, 26th June 1919.

**END OF THE GREAT WAR.**

The Great War terminated in the Armistice agreed to on 5th November 1918, and in the Treaty of Peace with Germany which was signed at Versailles on 28th June 1919.

At the Peace Conference in Paris the Commonwealth of Australia was ably represented by the Right Hon. WM. M. HUGHES, M.P., Prime Minister, and the Right Hon. Sir JOSEPH COOK, M.P., Minister for the Navy.

The peace delegates returned to Australia, arriving in Fremantle on the 23rd August 1919.

In the House of Representatives, Melbourne, on 10th of September, 1919, Mr. HUGHES laid on the table a copy of the Treaty of Peace with Germany, and he moved “ that the House approves of the Treaty.” He also stated that he desired to move the following additional resolution :—

“ That this House approves the Treaty made at Versailles on 28th June 1919, between His Majesty the King and the President of the French Republic, whereby in case the stipulations relating to the left bank of the Rhine, contained in the Treaty of Peace with Germany, signed at Versailles on the 28th day of June 1919, by the British Empire, the French Republic and the United States of America, among other Powers, may not at first provide adequate security and protection to France, Great Britain agrees to come immediately to her assistance in the event of an unprovoked movement of aggression against her being made by Germany.”

By the adoption of the Treaty and its legalization by the British Parliament, the Commonwealth of Australia will acquire a large addition to its legislative powers and its extra-territorial jurisdiction.

The interests of the Commonwealth in the Peace Treaty are represented mainly by the mandates to be given to it to take over and govern the Pacific Islands between the north-eastern coast of the Continent and the Equator, except Somoa, which goes to New Zealand. The islands of which Australia is to be the guardian and custodian under the League of Nations are :—

1. German New Guinea, adjoining the north of British New Guinea.
2. The Bismarck Archipelago and neighbouring islands.
3. The German Solomons.

The nearest of these islands are within eighty miles of the coast of Australia, and they could be used as a dangerous base by any hostile power in possession thereof.

Hence the Australian representatives at the Peace Conference had no hesitation in strongly opposing these islands being given back to Germany or that they should be an open door for both men and goods. Australia will receive these islands, not by way of annexation or in absolute sovereignty, but in trust for the League of Nations, and subject to certain conditions and limitations. The Parliament of Australia is to have the right to make laws for the peace, order, and good government of these islands. The only restrictions are that there shall be no sale of fire-arms to the natives, except for their self-defence ; that there shall be no sale of alcohol to the natives ; that there shall be no fortifications or armaments built thereon, and that the natives shall be free and not liable to the slave trade.

The guarantees of a White Australia are regarded by Mr. HUGHES as amongst the greatest of Australia's gains by the Treaty of Peace, and the Parliament and the public of Australia confirm this view.

A feature of Mr. HUGHES splendid speech was his generous tribute to our brave ally, Japan, and the re-assertion of the assurance that, whilst Australia fully recognized Japanese racial equality and earnestly desired the maintenance of friendly relations and national friendship, there is, at the same time, a wide difference between the national, ethnic, and domestic ideals of Australia and Japan.

Some of the details of the " islands' mandates " have not yet been disclosed. It may be assumed that in order to give the Commonwealth Parliament jurisdiction to pass the necessary laws for the government of the islands, they will have to be placed by the King under the authority of, and accepted by the Commonwealth within the meaning of the Constitution, section 122, or it may be that Imperial legislation will define the power and authority of the Commonwealth and give it the necessary extra-territorial jurisdiction.

In introducing the Peace Treaty and moving its ratification Mr. HUGHES delivered an historic speech which thrilled the House, and made a profound impression equal to the magnitude of the subject and the momentous character of the occasion.

"In order that Australia may be safe-guarded," said Mr. HUGHES, "it is necessary that the great rampart of islands around the north-east of Australia should be held by us, or by some power in whom we have absolute confidence. When the Armistice terms were decided on 5th November I protested because that national safety was not guaranteed. There was no assurance that possession of these islands would be vested in us. We sought to impress upon the Conference and the Council of Ten the position as we saw it. May I say that one of the most striking facts in this world conference was the appalling ignorance of every nation of the affairs of every other nation, of its geographical and its racial problems, and its history, condition and traditions. It was difficult to make the Council of Ten realise how utterly the safety of Australia depended upon the possession of these islands. Perhaps here, amongst Australians, there are very few who realise that New Guinea is itself greater in size than Cuba, the Philippines and Japan all rolled into one. Those who hold New Guinea hold us. Our coast line is so vast that to circumnavigate Australia is a voyage as great as from here to England. No 5,000,000 of people can possibly hold this Continent when 80 miles off there is a potential enemy. It would be impossible. Stretching out from New Guinea there are hundreds of other islands, every one of which is a point of vantage from which Australia could be attacked. We sought to obtain direct control of these islands, but President Wilson's Fourteen Points forbade that, and, after a long fight, the principle of the mandates was accepted. Then the nature of the fight changed, and since the mandatory principle was, willy nilly, forced upon us, we had to see that the form of the mandate was such that was consistent, not only with our national safety, but with our economic and general welfare. At first two principles arose, to which I direct your attention. One is the open door. It was sought to couple this mandate with the condition of an open door for man and goods. It is undesirable, for many reasons, that I should dwell very long on that, but I ask my fellow citizens throughout Australia to realize what that means. From within 80 miles of us there could come pouring down those who, when the hour should strike, could pounce on us on the mainland."

"We fought against the open door, and a mandate was at length obtained in the form in which it now stands. We have the same right to make laws over the islands as we have over the mainland. (Hear, hear). We have really far more rights to make laws there than we have here. We have the same rights there as the States had before Federation, subject only to four reservations. There can be no sale of firearms to the natives; we may not sell alcohol to the natives; we cannot raise any fortifications, and there cannot be any slavery. Those were things that we entirely endorsed, and there was no limiting the sovereign power necessary to our

salvation. The mandate has been bestowed upon us definitely. The terms of it have not yet been approved by the Council of Five, but that is a formal matter, and I am authorized to say that the terms are as I have stated."

"The next point to be dealt with is that which we call the 'White Australia' policy (Hear, hear). Members who have travelled in the East and in Europe will be able to understand with what difficulty this world gathering of men, representing both coloured and partly coloured peoples, was able to appreciate this ideal of 5,000,000 people who had dared to say over a great Continent that this was not only theirs, but none should enter in except such as they chose. (Hear, hear). Therefore, perhaps, the greatest thing we have achieved in such circumstances, in such an assembly, was the principle of a 'white Australia.' (Hear, hear). Here I speak for most, if not all, of the people of Australia. (Cheers). There are some at the two extremes of the poles of political opinion who do not hold these views, but thank God they are few in numbers, and, I hope, of limited influence. (Hear, hear). This is the foundation of all that Australia has fought for. This is the only part of the Empire or of the world in which there is so little admixture of races. In England and France you may hear men in adjoining counties or provinces speak different dialects, and in the case of France, unable to understand each other, but in no part of Australia can you distinguish one Australian from another by his speech. We are more British than Britain, and we hold firmly to this great principle of a 'white Australia' because we know what we know, and because we have liberty and we believe in our race and in ourselves, and in our capacity to achieve our great destiny. (Cheers). Our destiny is to hold this great Continent in trust for those who will come after us, and we must stand to those who have stood by us in the great battle for freedom. You can do what you please with it, but we have achieved this victory, and brought this principle out of the Conferences. (Cheers). There are many difficulties. The first amendment of the Japanese delegation proposed that, equality of the nations being a basic principle of the League of Nations, no distinctions should be made in law or fact because of race or nationality. I am entitled to tell you something of the story of this struggle for a 'White Australia.' This amendment was put forward in a dozen different ways, and modified again and again. Pressure was brought in this direction and that. It was so modified that at last it applied only to alien nationals in this country. We were asked to extend to them only those rights. I said then, speaking for Australia, that I would not consent to it, no matter what they put there." (Cheers).

The Treaties were approved almost unanimously by both Houses of the Commonwealth Parliament. An Act was passed ratifying an Agreement with Great Britain and New Zealand to share in the mandate over the rock phosphate island of Nauru in the South Pacific Ocean, a few miles south of the Equator.

## RECENT AMENDMENTS OF THE CONSTITUTION OF THE UNITED STATES.

The following are the latest Amendments of the Constitution of the United States :—

### ARTICLE XVII.

#### ELECTION OF SENATORS.

Providing for the direct choice of United States Senators by the people, was declared in force May 31st, 1913.

1. The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years ; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State Legislatures.

2. When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies : Provided, that the Legislature of any State may empower the Executive thereof to make temporary appointment until the people fill the vacancies by election as the Legislature may direct.

3. This amendment shall not be so construed as to affect the election or term of any Senator chosen before it becomes valid as part of the Constitution.

### ARTICLE XVIII.

#### LIQUOR PROHIBITION AMENDMENT.

1ST AUGUST 1917.

The Prohibition Amendment resolution passed by Congress reads :—

“ Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein) that the following Amendment to the Constitution be, and hereby is, proposed to the States, to become valid as a part of the Constitution when ratified by the Legislatures of the several States as provided by the Constitution :—

#### “ ARTICLE.

“ Section 1. After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating



liquors within, the importation thereof into or the exportation thereof from, the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

“Section 2. The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.

“Section 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the Legislatures of the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by Congress.”

The resolution was passed by the Senate, 65 to 20, on August 1, 1917, and by the House, 282 to 128, on December 17, 1917. Mississippi was the first State to ratify the Amendment, its Legislature acting on January 8, 1918.

Up to January 16, 1919, the Legislatures of thirty-six States—the required three-fourths—had ratified the Prohibition Constitutional Amendment, Nebraska being the thirty-six, on the date named. Ratification was completed January 15, 1919, by the Legislatures of five States—Iowa, Colorado, Oregon, New Hampshire, and Utah—making a total of twelve in two days.

The Amendment, under its provisions, became effective one year after the date of its final ratification. Additional legislation by Congress is necessary to make it operative, and ground work for this already has been laid. This legislation will prescribe penalties for violations of the Amendment and determine how and by what agencies the law shall be enforced.

On 10th October 1919, Congress passed the Prohibition Enforcement Bill. President Wilson's signature only is required to complete it. Wide authority is given to the States to suppress the liquor traffic.

### PROPOSED AMENDMENTS OF THE CONSTITUTION OF THE COMMONWEALTH.

In the House of Representatives on 1st October 1919, the Prime Minister, Mr. W. M. HUGHES re-introduced in a modified form, the scheme of constitutional amendments, contained in his Bill of 15th July 1915, *supra*, page 618.

The following tabulated statement shows in one column the Constitution as it stands at present and the parallel column the effect of the proposed alterations :—

## PRESENT CONSTITUTION.

## LEGISLATIVE POWERS.

Sec. 51 (I.). Trade and Commerce with other countries and among the States.

Sec. 51 (xx.). Foreign corporations and trading or financial corporations formed within the limits of the Commonwealth.

Sec. 51 (xxxv.). Conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State.

## PROPOSED CONSTITUTION.

## LEGISLATIVE POWERS.

Sec. 51 (I.). Trade and Commerce, provided that the alteration of this paragraph by Constitution Alteration (Legislative Powers) 1919 shall not be construed to empower the Parliament to make laws with respect to the control or management of railways the property of a State, or the rates or fares on such railways."

Sec. 51 (xx.). Corporations, including—

- (a) the creation, dissolution, regulation and control of corporations;
- (b) corporations formed under the law of a State, including their dissolution, regulation, and control; but not including municipal or governmental corporations, or any corporations formed solely for religious, charitable, scientific, or artistic purposes, and not for the acquisition of gain by the corporation or its members; and
- (c) foreign corporations, including their regulation and control.

Sec. 51 (xxxv.). Industrial matters, including—

- (a) labour;
- (b) employment and unemployment;
- (c) the terms and conditions of labour and employment in any trade, industry, occupation, or calling;
- (d) the rights and obligations of employers and employees;
- (e) strikes and lock-outs;
- (f) the maintenance of industrial peace; and
- (g) the settlement of industrial disputes.

Sec. 51 (xl.). Trusts, combinations, monopolies, and arrangements in relation to—

- (a) the production, manufacture, or supply of goods, or the supply of services; or
- (b) the ownership of the means of production, manufacture, or supply of goods, or supply of services.

Sec. 51A. The Parliament shall have power to make laws for carrying on by or under the control of the Commonwealth, the industry or business of producing, manufacturing, or supplying any specified goods, or of supplying any specified services and for acquiring for that purpose on just terms the assets and goodwill of the industry or business, where each House of the Parliament has in the same session, by resolution passed by

an absolute majority of its members, referred to the High Court, for inquiry and report by a Justice thereof the question whether the industry or business is the subject of a monopoly, and where, after the report of the Justice has been received, each House of the Parliament has, in one session, by majority of its members, declared that the industry or business is the subject of a monopoly.

This section shall not apply to any industry or business conducted or carried on by the Government of a State or any public authority constituted under a State."

The alterations made by this Act shall remain in force—

(a) until the expiration of three years from the assent of the Governor-General thereto; or

(b) until a convention constituted by the Commonwealth makes recommendations for the alteration of the Constitution and the people endorse those recommendations, whichever first happens, and shall then cease to have effect. Provided that if no such convention is constituted by the Commonwealth before the thirty-first day of December, one thousand nine hundred and twenty, the alterations made by this Act shall cease to have effect on the said thirty-first day of December, One thousand nine hundred and twenty.

"No law passed by the Parliament by virtue of the powers conferred by this Act shall continue to have any force or effect, by virtue of this Act, after the alterations made by this Act have ceased to have effect."

The arguments advanced in favour of and objections raised against the proposed amendment of the commerce power are stated, *supra*, page 305.

The case for and against the proposed amendment relating to corporations are stated, *supra*, page 500.

The case for and against the proposed amendments relating to the industrial power is stated *supra*, page 588.

The proposed amendment relating to trusts and combines is discussed, *supra*, page 606.

The proposed amendment relating to monopolies is referred to *supra*, page 613.

The whole of the proposed alterations were carried in the House of Representatives and the Senate and were ordered to be submitted to the people by referendum in December 1919.

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